whistleblower's interest as a citizen to discuss "matters of public concern" against the interest of government employer to ensure "the efficiency of the public services it performs through its employees."[46] Only a disclosure on "'a matter of legitimate public concern' upon which 'free and open debate is vital to informed decisionmaking by the electorate'" could be protected; comments on "matters only of personal interest" were outside the CSRA's scope.[47] *Fiorillo* additionally imposed an intent test in balancing the countervailing interests, requiring the whistleblower's "*primary* motivation" to be "desire to inform the public on matters of public concern, and not personal vindictiveness."[48] In *Stanek*, the Federal Circuit further narrowed the scope of protected disclosures.[49] In addition to the test prescribed in *Fiorillo*, a disclosure on a matter of "substantial public concern" was nonetheless not protected by the CSRA if it contradicted a government employer's policy.[50]

A Senate report attached to the WPA expressly condemned the Federal Circuit's decision in *Fiorillo*, explaining that the WPA would cover "*any* disclosure" to clarify that judicially-created loopholes could no longer be used to deny whistleblower protections.[51] Notably, in response to concerns over the Federal Circuit's seemingly anti-whistleblower jurisprudential

[46] *Id.* at 1550.

[47] *Id.* (citing *Connick*, 461 U.S. at 142).

[48] *Id.* Conceding that portions of the whistleblower's disclosures touched on topics about which the public had recently been concerned, the court nonetheless concluded that they were "essentially the airings of [his] personal complaints" and thus not protected by the CSRA. *Id.*

[49] The disclosures at issue were made by a research highway engineer who publicly criticized his agency's selected research and construction methods. *See id.* at 1574-75.

[50] *Id.* at 1578-79. The court reasoned that public disclosures of dissent from an employer's policy should not be protected from reprisal because "cohesive operation of management is dependent on the loyalty of inferior management to superior management." *Id.* at 1579 (citing Brown v. Dep't of Transp., 735 F.2d 543, 547 (Fed. Cir. 1984)). The court therefore found that the whistleblower's disclosures were not protected by the CSRA. *Id.*

[51] "The Committee intends that disclosures be encouraged…the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." S. REP. NO. 100-413 (1988).

trends, earlier drafts of the WPA contained a provision that would have given all of the circuit courts concurrent jurisdiction,[52] but the provision was ultimately removed.[53]

The WPA made two further changes to the CSRA's language to ease the whistleblower's burden of proof and increase the employer's burden.[54] First, the whistleblower would only have to prove that the challenged personnel action was taken "because of" whistleblowing conduct,[55] rather than "as a reprisal for" it.[56] This change removed the whistleblower's burden of proving that an action was taken with vindictive or punitive intent, reversing a series of cases in which whistleblowers had lost because their employers had "no hard feelings."[57] Second, the WPA articulated the burden of proof a whistleblower had to satisfy: That whistleblowing conduct had been a "contributing factor" in the challenged personnel action.[58] Because the CSRA did not prescribe the standard whistleblowers had to meet, MSPB and the Federal Circuit had consistently imposed the higher burden of requiring proof that whistleblowing had been a "substantial" or "motivating" factor.[59] The WPA filled a final gap in the CSRA by declaring that an employer could only rebut a whistleblower's prima facie case of reprisal if it demonstrated by clear and convincing evidence that it "would have taken the same personnel action in the absence

[52] *See id.*

[53] *See* Devine, *supra* note 3, at 552 n. 109.

[54] *See id.* at 553-55.

[55] Whistleblower Protection Act of 1989, Pub. L. 101-12, § 4, 103 Stat. 16, 32.

[56] Civil Service Reform Act of 1978, Pub. L. 95-454, § 101, 92 Stat. 1111, 1116.

[57] *See* Devine, *supra* note 3, at 554.

[58] *See* Pub. L. 101-12, § 3, 103 Stat. at 26.

[59] *See, e.g.,* Warren v. Dep't of the Army, 804 F.2d 654, 657 (Fed. Cir. 1986) ("We find that in the context of reprisal issues, the inquiry covers not only whether a retaliatory motive exists, but also whether there are independent grounds for initiating an action against an employee.").

of such disclosure."[60] Congress's message was clear: "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action."[61]

C. 1994 WPA Amendments

Despite the sweeping changes theoretically contained in the WPA's language, reprisal against whistleblowers continued at an alarming rate in practice,[62] prompting Congress to enact several major amendments in 1994.[63]

The definition of prohibited personnel practices was expanded in two significant ways. First, a new category of prohibited practices was added, covering an order by an employer that a whistleblower submit to psychiatric examination.[64] Second, a catchall provision was added to prevent employers from evading liability by using a personnel practice not specifically prohibited in the WPA as a means of reprisal;[65] the definition now included "any other significant change in duties, responsibilities, or working conditions."[66] Congress recognized that "the techniques to harass a whistleblower are limited only by the imagination"[67] and that

[60] Pub. L. 101-12, § 3, 103 Stat. at 26. This addition was precipitated by MSPB and Federal Circuit decisions that required employers to meet only a preponderance of the evidence standard. *See, e.g.,* Gerlach v. Fed. Trade Comm'n, 8 M.S.P.R. 268 (1981).

[61] 135 CONG. REC. 5033 (1989).

[62] *See* Devine, *supra* note 3, at 565-66 n. 189.

[63] *See* H.R. REP. NO. 103-769 (1994); S. REP. NO. 103-358 (1994).

[64] *See* Office of Special Counsel and Merit Systems Protection Board Authorization, Pub. L. 103-424, § 5, 108 Stat. 4361, 4363 (1994).

[65] "This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing." 140 CONG. REC. 29,353 (1994).

[66] Pub. L. 103-424, § 5, 108 Stat. at 4363.

[67] 140 CONG. REC. 29,353 (1994) (statement of Rep. McCloskey).

confining WPA claims to the limited enumerated categories of prohibited personnel practices effectively gave employers a blueprint for lawful whistleblower reprisal.[68]

Additionally, the amendments made it possible to satisfy the "contributing factor" standard without adducing direct evidence of reprisal; a whistleblower could prevail merely by demonstrating that "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action."[69]

Congress noted that MSPB and Federal Circuit precedents continued to pose the most significant obstacle to effective whistleblower protections, declaring that "the body of case law developed by [MSPB] and [the] Federal Circuit has represented a steady attack on achieving the legislative mandate" of the WPA and that "realistically it is impossible to overturn destructive precedents as fast as they are issued by the…Federal Circuit."[70] An accompanying report compiled a list of the specific MSPB and Federal Circuit doctrines that the amendments were intended to overturn,[71] citing various cases as illustrative of the condemned doctrines.[72] The House of Representatives explained that the Federal Circuit had likely insisted on stringent standards for whistleblower reprisal claims because its jurisdiction was generally limited to

[68] *See* Devine, *supra* note 3, at 567-68.

[69] Pub. L. 103-424, § 5, 108 Stat. at 4363. This provision was intended to overrule a recent decision in which the Federal Circuit expressly rejected a timing-based approach. *See* Clark v. Dep't of the Army, 997 F.2d 1466, 1472 (Fed. Cir. 1993).

[70] H.R. REP. NO. 103-769 (1994).

[71] These doctrines included finding against whistleblowers whenever "an agency believed that outside attention due to the employees protected whistleblowing upset co-workers," when an employee "[blew] the whistle in the context of a grievance," and when an employee failed to "cite the specific law(s) being violated" in a disclosure, among others. *Id.*

[72] *See id.* (citing Haley v. Department of Treasury, 977 F.2d 553 (Fed. Cir. 1992); Knollenberg v. Merit Systems Protection Board, 953 F.2d 263 (Fed. Cir. 1992); Weimers v. Merit Systems Protection Board, 792 F.2d 1113 (Fed. Cir. 1986); Nicholas v. Department of Air Force, No. 92-3472 (Fed. Cir.); DeSarno v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985); Baracco v. Department of Transportation, 15 M.S.P.R. 112 (1983), aff'd 735 F.2d 488 (Fed. Cir. 1984)).

highly technical areas like patent law, meaning that it lacked exposure to comparable areas of employment law.[73] Furthermore, the Federal Circuit's exclusive jurisdiction "eliminated the opportunity for the court to compare its decisions and have its decisions criticized by other courts."[74] In fact, the House of Representatives again passed a version of the amendments that would have expanded judicial review of WPA claims to all circuit courts,[75] but this version was abandoned in the Senate in the rush to secure enough votes to pass the amendments before Congress adjourned.[76]

D. Temporary All-Circuit Review

Prompted by several objectionable Federal Circuit decisions, a two-year all-circuit review pilot program was enacted in 2012 and later extended to five years.[77] A few notable whistleblower-friendly developments resulted during the temporary all-circuit review period.[78]

1. Objectionable Federal Circuit Decisions

The Federal Circuit continued to narrow the vast whistleblower protections contemplated by Congress, even after the 1994 amendments to the WPA. It focused primarily on the definition

[73] *See* H.R. REP. NO. 103-769 (1994).

[74] Landau, *supra* note 6, at 475.

[75] *See* H.R. 2970, 103d Cong.

[76] *See* Devine, *supra* note 3, at 572. Several Republican Senators opposed all-circuit review because of their belief in the importance of national uniformity in whistleblower reprisal claims, which they felt could only be secured through exclusive Federal Circuit jurisdiction. *See* Landau, *supra* note 6, at 476 n. 65.

[77] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, § 108, 126 Stat. 1465, 1469; All Circuit Review Extension Act, Pub. L. 113-170, § 2, 128 Stat. 1894, 1894 (2014).

[78] *See* Landau, *supra* note 6, at 480-87.

of protected disclosures,[79] defining three categories of disclosures that did not merit protection as exemplified by three leading cases.

The first category included disclosures made directly to the alleged wrongdoer, as illustrated by *Horton v. Department of the Navy*.[80] Reasoning that the WPA was intended to "encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it," and that "[c]riticism is not normally viewable as whistleblowing," the court repeatedly found the entire category of disclosure to be outside the scope of WPA protection.[81]

The second category covered any disclosure made as a part of a whistleblower's employment duties, as in *Huffman v. Office of Personnel Management*.[82] If "the employee ha[d], as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, report[ed] that wrongdoing through normal channels," those disclosures were not protected from reprisal under the WPA.[83]

Finally, the Federal Circuit excluded disclosures regarding publicly known information from WPA protection, as exemplified by *Meuwissen v. Department of Interior*.[84] Reasoning that "[t]he purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that

[79] Between 1994 and 2012, this element accounted for 52% of WPA cases decided on the merits by the Federal Circuit. *See* Ohanesian, *supra* note 1, at 625 n. 88.

[80] 66 F.3d 279 (Fed. Cir. 1995).

[81] *Id.* at 282; *see also, e.g.,* Willis v. Dep't of Agric., 141 F.3d 1139, 1143 (Fed. Cir. 1998) (finding that a disclosure of alleged wrongdoing to a supervisor who also engaged in the wrongdoing would not be protected by the WPA because it was not made to someone with the authority to correct the harm).

[82] 263 F.3d 1341 (Fed. Cir. 2001).

[83] *Id.* at 1352.

[84] 234 F.3d 9 (Fed. Cir. 2000).

information," the court refused to protect disclosures about "alleged misconduct [that] was not concealed."[85]

2. Whistleblower Protection Enhancement Act of 2012 and All Circuit Review Extension Act

Faced with the Federal Circuit's continued refusal to interpret the WPA in a manner consistent with its intent, Congress unanimously enacted the Whistleblower Protection Enhancement Act ("WPEA") in 2012.[86] The amendments contained in the WPEA "clarify the disclosures of information protected from prohibited personnel practices" by specifying that the time, place, manner, and motive of disclosures are not dispositive of protection.[87] The WPEA deliberately overrules the Federal Circuit's *Horton*, *Huffman*, and *Meuwissen* holdings, explaining that a disclosure may not be excluded from protection merely because it is made to an alleged wrongdoer, constitutes part of an employee's normal duties, or contains information that is already publicly known.[88]

Even more significantly, the WPEA finally vindicated Congress's longstanding goal of providing for judicial review of whistleblower reprisal claims in all of the circuit courts.[89] While an earlier draft of the bill would have immediately made all-circuit review permanent,[90] several Republican Senators threatened to withhold support out of concern that the bill would unleash a

[85] *Id.* at 13.

[86] *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199, 126 Stat. 1465; Ohanesian, *supra* note 1, at 627-28.

[87] Pub. L. 112-199, § 101, 126 Stat. at 1465.

[88] *See id.* at 1466.

[89] "During the 2-year period beginning on the effective date of the [WPEA], a petition to review a final order or final decision of [MSPB] [regarding whistleblowing] shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction." Pub. L. 112-199, § 108, 126 Stat. at 1469.

[90] *See* S. REP. NO. 112-155 (2012).

flood of litigation in the regional circuit courts.[91] The finalized WPEA was a compromise, establishing a two-year pilot program after which the Government Accountability Office would conduct an impact study.[92]

In 2013, realizing that "few cases [had] as of yet been resolved through alternative court venues,"[93] Congress unanimously passed the All Circuit Review Extension Act,[94] which extended the original two-year program to five years to "provide…a better understanding of whether permanent changes to the MSPB appeal process [were] warranted."[95] In passing the All Circuit Review Extension Act, Congress again noted "the Federal Circuit's overwhelming record of ruling against whistleblowers—a record that [included] a series of questionable interpretations of the law," driving home its intent to improve whistleblower protections by stripping the Federal Circuit's exclusive jurisdiction.[96]

3. Whistleblower-Friendly Developments

Soon after the WPEA's initial grant of all-circuit review, MSPB consciously departed from Federal Circuit precedent in *Day v. Department of Homeland Security*.[97] At issue in *Day* was whether the WPEA's language regarding protected disclosures applied retroactively; this would determine whether the claimant's disclosures, which had been made both in the course of

[91] *See* Landau, *supra* note 6, at 479.

[92] *See id.*; Pub. L. 112-199, § 108, 126 Stat. at 1469.

[93] H.R. REP. NO. 113-519 (2014).

[94] *See* Landau, *supra* note 6, at 479-80; All Circuit Review Extension Act, Pub. L. 113-170, § 2, 128 Stat. at 1894.

[95] H.R. REP. NO. 113-519 (2014).

[96] *Id.*

[97] 119 M.S.P.R. 589, 600-01 (2013).

his normal duties and to an alleged wrongdoer, were protected.[98] Relying on regional circuit court precedents and expressly rejecting the Federal Circuit's precedent, MSPB determined that the WPEA merely clarified the WPA, rather than substantively changing it, and could therefore apply retroactively to the instant case.[99] In dicta, MSPB also highlighted several instances where it had "question[ed] the breadth of the court's decisions with regard to excluding certain disclosures from the WPA's protection" and "cautioned against citing [a Federal Circuit case] for broad propositions concerning protected whistleblowing" because it believed the Federal Circuit's interpretation to be inconsistent with the intent of the WPA.[100] The holding and language of *Day* seem to indicate MSPB's willingness to adopt more whistleblower-friendly standards from the regional circuits and may provide a useful guide for future MSPB decisionmaking.

In *Delgado v. Merit Systems Protection Board* ("*Delgado I*"),[101] the Seventh Circuit used its first review of an MSPB whistleblower reprisal decision to stake out a more whistleblower-friendly position. *Delgado I* required the court to determine the appropriate standard for determining whether the whistleblower had exhausted his remedies before OSC prior to seeking

[98] *See id.* at 591-95. The standard for determining whether a statute should be given retroactive effect was announced in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which declared that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 264. Thus, if a new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," it should not apply retroactively in a pending case. *Id.* at 280.

[99] *See Day*, 119 M.S.P.R. at 595-99, 595 n. 5 ("We have discretion…because the WPEA has changed the rights to judicial review of whistleblowers to include other courts of appeal for a 2-year period…Therefore, we must determine the issue of retroactivity with the view that the appellant ultimately may seek review of this decision before any appropriate court of appeal.").

[100] *Id.* at 598 (citing Askew v. Dep't of the Army, 88 M.S.P.R. 674 (2001); then citing Czarkowski v. Dep't of the Navy, 87 M.S.P.R. 107 (2000)).

[101] 880 F.3d 913 (7th Cir. 2018).

MSPB review, an important procedural question in whistleblower reprisal cases.[102] Under the Federal Circuit's case law, the whistleblower must "inform [OSC] of the precise ground of his charge of whistleblowing."[103] In practice, this standard has frequently excluded complaints filed by whistleblowers who are not trained in the law and thus fail to include the requisite degree of detail.[104] Rejecting MSPB's use of the Federal Circuit's standard as "unusually stringent," the Seventh Circuit looked to analogous statutory exhaustion schemes from regional circuit and Supreme Court case law to craft a standard under which whistleblowers can seek MSPB review so long as they have presented OSC "sufficient information to permit a legally sophisticated reader to understand [the allegations] and to investigate."[105] *Delgado I* was an important departure from Federal Circuit precedent and should serve as a guide for the other regional circuits.

E. All Circuit Review Act

The ACRA was passed when the All Circuit Review Extension Act expired, finally making all-circuit review of whistleblower reprisal claims permanent.[106] In enacting the ACRA, Congress conclusively rejected the arguments of critics of all-circuit review,[107] who had warned that the "sledgehammer" of all-circuit review would "create resource inefficiencies,"[108] permit

[102] Whistleblowers may not pursue their claims before MSPB until they have exhausted their remedies with OSC. *See id.*; Whistleblower Protection Act of 1989, Pub. L. 101-12, § 3, 103 Stat. 16, 29.

[103] *E.g.,* Ward v. Merit Sys. Prot. Bd., 981 F.2d 521, 526 (Fed. Cir. 1992).

[104] *See Delgado I*, 880 F.3d at 923-25.

[105] *See id.* at 920-27.

[106] *See* All Circuit Review Act, Pub. L. 115-195, 132 Stat. 1510 (2018).

[107] *See* S. REP. NO. 115-229.

[108] Jocelyn Patricia Bond, *Efficiency Considerations and the Use of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions*, 19 FED. CIR. B.J. 107, 137 (2009).

forum shopping, or otherwise promote excessive litigation.[109] Congress determined that these concerns were unfounded because they had not borne out in practice; the regional circuits had only heard six whistleblower reprisal cases between the enactment of the WPEA and 2018, while the Federal Circuit had heard thirty-one.[110]

Congress declared that the Federal Circuit's exclusive jurisdiction had denied federal personnel "the most important single procedure which holds appeals court judges reviewable and accountable," and that "the rationale for the Federal Circuit's subject matter-based jurisdiction—the need for specialization in a particular area of the law—[did] not apply in whistleblower jurisprudence."[111] It also voiced concern about the alarmingly low number of Federal Circuit cases in which whistleblowers had prevailed since the 1994 WPA amendments.[112] Citing favorably the Seventh Circuit's decision in *Delgado I*, Congress affirmed that "a 'split in the circuit' was intended to occur with all-circuit review authority" so that the regional circuit courts could turn a critical eye to the Federal Circuit's whistleblower reprisal jurisprudence and "increase accountability in their interpretations of the laws."[113] Despite Congress's manifest desire to alter the anti-whistleblower standards that the Federal Circuit has developed, the regional circuit courts have largely adopted these standards as controlling in whistleblower reprisal cases.

---

[109] Chris Carlson, *A Supreme Debacle: The Federal Circuit's Opportunity to Retain Exclusive Jurisdiction of Federal Whistleblower Appeals*, 24 FED. CIR. B.J. 293, 313 (2014-2015).

[110] *See* S. REP. NO. 115-229.

[111] *Id.*

[112] "From October 1994 until WPEA's enactment in 2012, the Federal Circuit ruled favorably for Federal employee whistleblowers on only three out of 243 appeals considered. Between enactment of [the WPEA] and…2018, the Federal Circuit heard 31 appeals of Federal employee whistleblowers and ruled favorably for the whistleblower in just one." *Id.*

[113] *Id.*

III. Regional Circuit Court Whistleblower Cases After the ACRA

This section analyzes trends among the regional circuit courts following the 2018 enactment of the ACRA. Among the circuit courts that have taken up WPA claims, only the First Circuit and Seventh Circuit have departed from Federal Circuit precedent and held in whistleblowers' favor.[114] The remainder of the courts have indicated that they intend to follow the Federal Circuit's case law on WPA claims.[115] Neither the Second Circuit, Third Circuit, nor Eighth Circuit has taken up whistleblower claims during this period, so they are excluded.

A. The First Circuit

The First Circuit court has only heard one WPA claim since the 2018 enactment of the ACRA, but that single case constituted a significant departure from Federal Circuit precedent.[116] In *Mount v. Department of Homeland Security*,[117] the First Circuit declined to adhere to the Federal Circuit's stringent exhaustion standard, declaring it "unnecessary for an employee to correctly label the cause of action or legal theory behind his claim for it to be deemed exhausted before the OSC, as long as he or she provides a 'sufficient [factual] basis' for the MSPB to pursue an investigation regarding that particular claim."[118] As such, the First Circuit adopted the exhaustion standard enumerated by the Seventh Circuit in *Delgado I*.[119] The court's analysis drew heavily on the *Delgado I* opinion, which it cited for the proposition that the WPA does not demand "a perfectly packaged case ready for litigation" and that it should not be construed to

[114] *See infra* parts III.A., III.E.

[115] *See infra* parts III.B.-III.D, III.F.-III.I.

[116] *See* Mount v. Dep't of Homeland Sec., 937 F.3d 37 (1st Cir. 2019).

[117] 937 F.3d 37 (1st Cir. 2019).

[118] *Id.* at 48.

[119] *See id.* at 47-48 (citing Delgado v. Merit Sys. Prot. Bd., 880 F.3d 913, 923-24 (7th Cir. 2018)).

"[make] it harder for whistleblowers to obtain relief."[120] The fact that the First Circuit has used its single whistleblower reprisal case to join the Seventh Circuit in staking out a whistleblower-friendly stance is certainly promising, but whether the court will continue this trend in addressing more substantive issues remains to be seen.

B. The Fourth Circuit

The Fourth Circuit has heard four WPA claims since the 2018 enactment of the ACRA, finding against the alleged whistleblowers in all four cases.[121] The cases fall into three categories: two cases where WPA litigants improperly filed suit in district courts,[122] one case where the claimant had failed to allege both a protected disclosure and that such disclosure had been a contributing factor in the challenged personnel action,[123] and one case where the employer proved by clear and convincing evidence that it would have taken the same personnel action absent the alleged whistleblowing conduct.[124] The first two cases involve a procedural question that has not proven controversial in WPA jurisprudence, as the federal district courts do not have jurisdiction over federal personnel whistleblower reprisal claims.[125] However, the latter

[120] *Id.* at 45-46.

[121] *See* Campbell v. McCarthy, 952 F.3d 193 (4th Cir. 2019); Zachariasiewicz v. Dep't of Just., 48 F.4th 237 (4th Cir. 2022); Jones v. Merit Sys. Prot. Bd., No. 21-1254, 2022 U.S. App. LEXIS 7189 (4th Cir. 2019); Weber v. Dep't of Veterans Affs., No. 19-2004, 2022 U.S. App. LEXIS 15173 (4th Cir. 2022).

[122] *See Campbell*, 952 F.3d at 207; *Zachariasiewicz*, 48 F.4th at 249.

[123] The claimant's disclosures were not protected because they were merely "vague allegations of wrongdoing regarding broad and imprecise matters," and they had not been a contributing factor in the challenged personnel actions because the acting officials were not aware of the disclosures. *See Jones*, 2022 U.S. App. LEXIS 7189 at *1; Jones v. Dep't of Def., 2021 MSPB LEXIS 300, *28-37 (Jan. 25, 2021).

[124] The employer had sustained its burden by providing evidence that workplace hostilities would have supported the challenged personnel action and that the acting supervisor possessed no animus toward the whistleblower. *See Weber*, 2022 U.S. App. LEXIS 15173 at *5-7.

[125] WPA claims must be filed with MSPB, and appeals from MSPB's WPA decisions are only to be heard by "the Federal Circuit or any court of appeals of competent jurisdiction." 5 U.S.C. § 7703.

two cases indicate that the Fourth Circuit has displayed a tendency to conform with Federal Circuit precedent on WPA issues,[126] making it similarly unfriendly to WPA litigants.

C. The Fifth Circuit

The Fifth Circuit has only heard one WPA claim since the 2018 enactment of the ACRA, which was decided against the alleged whistleblower.[127] The court found that WPA protection was not appropriate because the plaintiff, who served as a supervisor, did not occupy a "covered position" within the statute's definition.[128] While the court correctly explains that the plaintiff's position is not specifically enumerated in the WPA,[129] its general discussion of the law's scope clearly evinces the court's unwillingness to read the WPA expansively as the remedy Congress intended it to be.[130] This narrow interpretation may signal that the court is likely to take a less whistleblower-friendly stance on less clear-cut questions in the future.

D. The Sixth Circuit

The Sixth Circuit has heard two WPA claims since the 2018 enactment of the ACRA, both of which were decided against the alleged whistleblowers.[131]

---

[126] *See Jones*, 2022 U.S. App. LEXIS 7189 at *1 (denying rehearing of an MSPB decision that relied heavily on Federal Circuit standards); *Weber*, 2022 U.S. App. LEXIS 15173 at *6-7 (adopting the Federal Circuit's test for determining whether an employer would have taken the same adverse personnel action absent any whistleblowing conduct).

[127] *See* Davis v. U.S. Marshals Serv., 849 F. App'x 80 (5th Cir. 2021).

[128] *See id.* at 81-82, 85.

[129] *See id.* at 85.

[130] *Id.* (rejecting the claimant's argument that "he should be allowed to proceed with his claim 'to comport with the spirit and meaning of the Act'").

[131] *See* Eluhu v. Dep't of Veterans Affs., 801 F. App'x 952 (6th Cir. 2020); Carson v. Merit Sys. Prot. Bd., No. 20-3459, 2021 U.S. App. LEXIS 14691 (6th Cir. 2021).

The first case, *Eluhu v. Department of Veterans Affairs*,[132] demonstrates that the Sixth Circuit may take an even more stringent approach to evaluating the "contributing factor" element than the Federal Circuit has.[133] The court held that the plaintiff had failed to establish that his disclosure was a contributing factor because he did not adduce direct evidence that the supervisor responsible for the challenged personnel action had actual knowledge of the disclosure.[134] While the court acknowledged the language added to the WPA by the 1994 amendments, which allows a plaintiff to prove constructive knowledge based on timing, it nonetheless held that the plaintiff's demonstration of a mere three-month period between his disclosure and the challenged personnel action was "nothing more than [an] unsubstantiated claim."[135] This analysis is shockingly dismissive of both the plain language of the WPA and the validity of the plaintiff's claim, demonstrating a likely hostility toward whistleblowers from the Sixth Circuit.

In *Carson v. Merit Systems Protection Board*,[136] the court found that an employer's failure to investigate the claims contained in an employee's disclosure, absent any other adverse action, do not fit the definition of "prohibited personnel practice" under the WPA.[137] The court explained, citing Federal Circuit precedent, that personnel actions with "no impact on day-to-day duties and responsibilities" do not fit within the WPA's prohibition of any retaliatory "significant change in duties, responsibilities, or working conditions."[138] Since the employer's mere failure to

[132] 801 F. App'x 952 (6th Cir. 2020).

[133] *See id.* at 955-56.

[134] *See id.* at 955.

[135] *Id.* at 955-56.

[136] No. 20-3459, 2021 U.S. App. LEXIS 14691 (6th Cir. 2021).

[137] *See id.* at *8-9.

[138] *See id.* at *7-8 (citing Hesse v. Dep't of State, 217 F.3d 1372, 1378-81 (Fed. Cir. 2000)).

investigate did not "[result] in a physical difference in the conditions of his job or [affect] his duties or responsibilities," the claimant had not established a prohibited personnel practice.[139]

E. The Seventh Circuit

The Seventh Circuit has heard two WPA claims since the 2018 enactment of the ACRA, one of which was decided in favor of the alleged whistleblower and one of which was decided against the alleged whistleblower.[140]

In *Delgado v. Department of Justice* ("*Delgado II*"),[141] the court had previously found in the plaintiff's favor, remanding the case to MSPB.[142] MSPB, however, failed to comport with the court's opinion and again dismissed the plaintiff's claim in "an obvious, unexplained, and astonishing example of administrative obduracy."[143] The court dedicates its opinion to a lengthy explanation of the specific provisions of the WPA and a thorough analysis of its application to the instant case, emphasizing Congress's intent to prohibit reprisal against whistleblowers and condemning MSPB's rigid enforcement.[144] While the case certainly elicits concern about MSPB's desire and ability to enforce the WPA, it affirms the Seventh Circuit's willingness to depart from Federal Circuit precedent in substantive respects.

---

[139] *Id.* at *8.

[140] *See* Delgado v. Dep't of Just., 979 F.3d 550 (7th Cir. 2020); Sledge v. Wilkie, 771 F. App'x 664 (7th Cir. 2019).

[141] 979 F.3d 550 (7th Cir. 2020).

[142] *See id.* at 553; *supra* part II.D.3.

[143] *Delgado II*, 979 F.3d at 556.

[144] *See id.* at 553-62.

In *Sledge v. Wilkie*,[145] the court found that the plaintiff had failed to exhaust her remedies before OSC because she had never filed an OSC complaint.[146] Although the case was decided against the whistleblower, it is notable that the Seventh Circuit does not cite any Federal Circuit precedent in its brief opinion.[147] This seems to indicate that the Seventh Circuit will remain at the forefront of the development of new whistleblower reprisal jurisprudence.

F. The Ninth Circuit

The Ninth Circuit has heard six WPA claims since the 2018 enactment of the ACRA, finding against the alleged whistleblowers in all six of them.[148] The cases can be summarized as follows: three cases where employers proved by clear and convincing evidence that they would have taken the same personnel action absent any whistleblowing conduct,[149] one case where the disclosure did not merit WPA protection,[150] one case where the plaintiff's claim was precluded by res judicata,[151] and one case where a district court properly dismissed the complaint for lack of subject matter jurisdiction.[152]

The cases in which the court found that employers had successfully carried their evidentiary burden present the most obvious indications that the Ninth Circuit intends to adhere

[145] 771 F. App'x 664 (7th Cir. 2019).

[146] *See id.* at 665.

[147] *See id.* at 665-67.

[148] *See* Alguard v. Dep't of Agric., 755 F. App'x 699 (9th Cir. 2019); Huang v. Dep't of Homeland Sec., 844 F. App'x 942 (9th Cir. 2021); Lucchetti v. Dep't of the Interior, 754 F. App'x 542 (9th Cir. 2018); Flynn v. Dep't of the Army, 802 F. App'x 298 (9th Cir. 2020); Mason v. Dep't of Def., 821 F. App'x 888 (9th Cir. 2020) French v. Wash. State Dep't of Health, 735 F. App'x 367 (9th Cir. 2018).

[149] *See Alguard*, 755 F. App'x at 700; *Huang*, 844 F. App'x at 943-45; *Lucchetti*, 754 F. App'x at 543-45.

[150] *See Flynn*, 802 F. App'x at 299.

[151] *See Mason*, 821 F. App'x at 889.

[152] The plaintiff attempted to sue a state agency for whistleblower reprisal and the district court rejected her suit because "the WPA only applies to federal employees of executive agencies." *French*, 735 F. App'x at 367.

closely to earlier Federal Circuit precedent when deciding whistleblower reprisal cases, as all three opinions cite the Federal Circuit for the appropriate test and analysis thereunder.[153] The test, announced in *Carr v. Social Security Administration*,[154] instructs a court to consider "(1) 'the strength of the agency's evidence in support of' its action; (2) 'the existence and strength of any motive to retaliate'; and (3) 'any evidence that the agency takes similar actions against' otherwise similarly situated non-whistleblowers."[155] Analysis under the *Carr* test provides a loophole by which the WPA's protection of "*any* disclosure" can be avoided.[156] These cases have found that employers satisfactorily demonstrated that they would have taken the challenged personnel action based on the "character or nature" of the disclosure, absent any other evidence of inadequate employee performance.[157] This doctrine blatantly contradicts Congress's express intent that "[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action."[158] The line of cases creating the doctrine does not supply any guiding principle for employers to determine what qualities a disclosure must have in order to justify an adverse personnel action, essentially creating a ready-made excuse for retaliatory actions that are

[153] *See, e.g., Alguard*, 755 F. App'x at 699-700 (affirming that the Ninth Circuit applies the Federal Circuit's test in assessing whether the employer has met its evidentiary burden).

[154] 185 F.3d 1318 (Fed. Cir. 1999).

[155] *Alguard*, 755 F. App'x at 700 (citing *Carr*, 185 F.3d at 1323).

[156] *See, e.g.,* Kalil v. Dep't of Agric., 479 F.3d 821, 825 (Fed. Cir. 2007) (holding that the manner in which a whistleblower makes a protected disclosure can itself be grounds for an adverse personnel action, and therefore finding that the employer had satisfied its evidentiary burden).

[157] *See id.*; *see also* Duggan v. Dep't of Def., 883 F.3d 842, 846-47 (9th Cir. 2018) (finding the employer had satisfied its evidentiary burden because the whistleblower's disclosure "conveyed a nasty and condescending tone").

[158] 135 CONG. REC. 5033 (1989).

challenged in court. The Ninth Circuit's adoption of this approach signals that it will be a hostile forum for whistleblowers.[159]

The remaining cases pose similar concerns for potential whistleblowers. In *Flynn v. Department of the Army*,[160] the Ninth Circuit adopted a burdensome Federal Circuit test for determining whether a whistleblower's allegations of protected disclosures are "frivolous" or not.[161] This test is reminiscent of the Federal Circuit's *Fiorillo* approach, which required an assessment of the whistleblower's state of mind and motivation for making the disclosures but was overruled by the WPA.[162] Imposing a stringent requirement that a whistleblower be familiar with the legal nuances of potential disclosures in order for the disclosures to merit protections clearly contradicts the intent of WPA protections.

The Ninth Circuit's whistleblower reprisal cases during the relevant period have relied heavily on Federal Circuit precedent and imposed similarly stringent requirements on whistleblowers, which likely means it does not plan to meaningfully depart from the Federal Circuit in future cases.

---

[159] *See Alguard*, 755 F. App'x at 700 (reasoning that because the plaintiff's disclosure "was not directed at agency personnel, it was not likely to create a strong motive to retaliate," so the employer had satisfied its evidentiary burden); *Huang*, 844 F. App'x at 944 (finding the employer had satisfied its evidentiary burden because the whistleblower's disclosures were delivered with an "abrasive tone"); *Lucchetti*, 754 F. App'x at 544 (holding the employer had satisfied its evidentiary burden despite adducing no evidence about discipline against similarly situated non-whistleblowers).

[160] 802 F. App'x 298 (9th Cir. 2020).

[161] "[U]nder the WPA, an employee must 'reasonably believe' that the disclosure relates to an activity prohibited under the statute." *Flynn*, 802 F. App'x at 299 (citing Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

[162] *See* Fiorillo v. Dep't of Just., 795 F.2d 1544, 1550 (Fed. Cir. 1986); *see also* S. REP. NO. 100-413 (1988).

G. The Tenth Circuit

The Tenth Circuit has heard four WPA claims since the 2018 enactment of the ACRA, all of which have been decided against the alleged whistleblowers.[163] The cases can be summarized as follows: two cases where the disclosures at issue were not protected by the WPA,[164] and two cases that were improperly filed in district courts.[165] The first two cases are notable because they cite only to Federal Circuit cases for the relevant WPA standards, indicating that the Tenth Circuit is not interested in developing its own whistleblower reprisal precedent.[166] The court's disposition of the other two cases is less concerning because, as discussed above, the federal district courts' inability to hear whistleblower reprisal cases has never been seriously challenged.[167]

H. The Eleventh Circuit

The Eleventh Circuit has heard two WPA claims since the 2018 enactment of the ACRA, both of which were decided against the alleged whistleblowers.[168] One case turned on the whistleblower's failure to allege a protected disclosure,[169] while the other turned on the district court's lack of jurisdiction.[170]

---

[163] *See* Baca v. Dep't of the Army, 983 F.3d 1131 (10th Cir. 2020); Bussey v. Esper, 818 F. App'x 783 (10th Cir. 2020); Fulkerson v. Comm'r, Soc. Sec. Admin., No. 21-2001, 2021 U.S. App. LEXIS 29110 (10th Cir. 2021); Padilla v. Mnuchin, 836 F. App'x 674 (10th Cir. 2020).

[164] *See Baca*, 983 F.3d at 1142; *Bussey*, 818 F. App'x at 786.

[165] *See Fulkerson*, 2021 U.S. App. LEXIS 29110 at *9-10; *Padilla*, 836 F. App'x at 677.

[166] *See Baca*, 983 F.3d at 1138-42; *Bussey*, 818 F. App'x at 786-87.

[167] *See supra* part III.B.

[168] *See* Abrahamsen v. Dep't of Veterans Affs., No. 20-14771, 2021 U.S. App. LEXIS 33948 (11th Cir. 2021); Boyd v. Dep't of Veterans Affs., 808 F. App'x 1015 (11th Cir. 2020).

[169] *See Abrahamsen*, 2021 U.S. App. LEXIS 33948 at *9-14.

[170] *See Boyd*, 808 F. App'x at 1015-16.

As in other circuit courts, the Eleventh Circuit's adoption of the Federal Circuit's test for "frivolous" allegations of protected disclosures is concerning. In *Abrahamsen v. Department of Veterans Affairs*,[171] the court first disregarded the relevance of the whistleblower's disclosures of a hostile, retaliatory work environment, then concluded that his disclosures of potential threats to health and safety did not involve a sufficient degree of risk to justify WPA protection.[172] Adopting this test continues the Federal Circuit's project of narrowing the scope of protected disclosures under the WPA and indicates that the Eleventh Circuit is not a whistleblower-friendly forum.

I. The D.C. Circuit

The D.C. Circuit has heard two WPA claims since the 2018 enactment of the ACRA, both of which were decided against the alleged whistleblowers.[173] One case turned on the employer's successful showing that it would have taken the challenged personnel action absent the protected disclosure,[174] while the other turned on the pendency of the whistleblower's MSPB action.[175]

In *Marcato v. Agency for International Development*,[176] the D.C. Circuit adopted the Federal Circuit's *Carr* factors to determine whether the employer sustained its evidentiary burden.[177] It also relied on Federal Circuit precedent to hold that a whistleblower's successful

[171] No. 20-14771, 2021 U.S. App. LEXIS 33948 (11th Cir. 2021).

[172] *See id.* at *14-15.

[173] *See* Marcato v. Agency for Int'l Dev., 11 F.4th 781 (D.C. Cir. 2021); Nastri v. Merit Sys. Prot. Bd., No. 19-1130, 2019 U.S. App. LEXIS 32620 (D.C. Cir. 2019).

[174] *See Marcato*, 11 F.4th at 786-90.

[175] *See Nastri*, 2019 U.S. App. LEXIS 32620 at *1-2.

[176] 11 F.4th 781 (D.C. Cir. 2021).

[177] *See id.* at 786-90.

showing that a protected disclosure was a contributing factor in the challenged personnel action is not sufficient to evince the employer's "retaliatory motive" as contemplated by the *Carr* factors.[178] This doctrine would return whistleblower reprisal jurisprudence to the era expressly condemned by the original enactment of the WPA, during which the Federal Circuit consistently required evidence of punitive or vindictive intent as a means of screening out otherwise legitimate claims of reprisal.[179] Imposing a new "retaliatory motive" standard contradicts the intended effect of the WPA: That personnel practices based on protected disclosures in any way would be made unlawful, rather than requiring the whistleblower to attempt to prove the employer's subjective state of mind.[180]

In *Nastri v. Merit Systems Protection Board*,[181] the whistleblower had attempted to obtain judicial review of his claims before MSPB had actually issued a final decision, so the Eleventh Circuit declined to hear his case.[182] Like district court jurisdiction, the concept that judicial review is unavailable until MSPB issues a final decision has been uncontroversial in whistleblower reprisal cases since the relevant statutory language only permits judicial review of "a final order or decision of the Merit Systems Protection Board."[183]

[178] *See id.* at 788-89 (citing Kewley v. Dep't of Health & Hum. Servs., 153 F.3d 1357, 1364-65 (Fed. Cir. 1998)).

[179] *See* Devine, *supra* note 3, at 554.

[180] *See* 135 CONG. REC. 5033 (1989).

[181] No. 19-1130, 2019 U.S. App. LEXIS 32620 (D.C. Cir. 2019).

[182] *Id.* at *1-2.

[183] 5 U.S.C. § 7703.

J. Summary

Of the twenty-four cases heard by the regional circuit courts after the enactment of the ACRA, only two have been decided in whistleblowers' favor.[184] Of the remaining twenty-two, many simply cite to Federal Circuit precedent without any discussion of the ACRA, the WPA, or the policy considerations underlying whistleblower protections. This may be for a variety of reasons; courts are generally likely to be more comfortable relying on existing precedent than attempting to develop a new body of case law, the regional circuits are being asked to review MSPB decisions shaped by decades of Federal Circuit cases, or the courts may simply agree with the Federal Circuit's project of narrowing whistleblower protections.

The First Circuit and Seventh Circuit may nonetheless prompt the other circuits to reconsider their reliance on the Federal Circuit by highlighting the inconsistency of its decisions with Congress's intent and by developing new case law.

IV. Federal Circuit Whistleblower Cases After the ACRA

The Federal Circuit has heard thirty-five WPA claims since the 2018 enactment of the ACRA, eight of which were decided in favor of the alleged whistleblowers,[185] and twenty-seven of which were decided against the alleged whistleblowers.[186]

---

[184] *See* Mount v. Dep't of Homeland Sec., 937 F.3d 37 (1st Cir. 2019); Delgado v. Dep't of Just., 979 F.3d 550 (7th Cir. 2020).

[185] *See* Craft v. Merit Sys. Prot. Bd., 860 F. App'x 744 (Fed. Cir. 2021); Conejo v. Merit Sys. Prot. Bd., No. 2021-1347, 2021 U.S. App. LEXIS 26341 (Fed. Cir. 2021); Smolinski v. Merit Sys. Prot. Bd., 23 F.4th 1345 (Fed. Cir. 2022); Doyle v. U.S. Dep't of Veterans Affs., 855 F. App'x 753 (Fed. Cir. 2021); Hessami v. Merit Sys. Prot. Bd., 979 F.3d 1362 (Fed. Cir. 2020), Marana v. Merit Sys. Prot. Bd., No. 2021-1463, 2022 U.S. App. LEXIS 1603 (Fed. Cir. 2022); Tao v. Merit Sys. Prot. Bd., 855 F. App'x 716 (Fed. Cir. 2021); McLaughlin v. Merit Sys. Prot. Bd., 853 Fed. App'x 648 (Fed. Cir. 2021).

[186] *See* Alguard v. Dep't of Agric., No. 2021-2154, 2022 U.S. App. LEXIS 21409 (Fed. Cir. 2022); Aubart v. Merit Sys. Prot. Bd., No. 2021-2190, 2022 U.S. App. LEXIS 1262 (Fed. Cir. 2022); Finizie v. Dep't of Veterans Affs., No. 2021-1493, 2021 U.S. App. LEXIS 32735 (Fed. Cir. 2022); Gessel v. Merit Sys. Prot. Bd., No. 2021-1815, 2022 U.S. App. LEXIS 1387 (Fed. Cir. 2022); Miranne v. Dep't of the Navy, No. 2021-1497, 2021 U.S. App. LEXIS 30261 (Fed. Cir. 2021); Oram v. Merit Sys. Prot. Bd., No. 2021-2307, 2022 U.S. App. LEXIS 7627 (Fed. Cir. 2022); Young v. Merit Sys. Prot. Bd., 961 F.3d 1323 (Fed. Cir. 2020); Lentz v. Dep't of the Interior, No. 2022-

A. Favorable Outcomes for Whistleblowers

The cases in which the alleged whistleblowers prevailed can be summarized as follows: two cases in which MSPB had erred in finding that it lacked jurisdiction over the WPA claim,[187] one case in which the employer failed to prove that it would have taken the challenged personnel action absent the protected disclosure,[188] four cases in which the whistleblowers had made protected disclosures under the WPA,[189] and one case in which MSPB had improperly excluded part of the plaintiff's pleadings.[190]

2009, 2022 U.S. App. LEXIS 30662 (Fed. Cir. 2022); Hobson v. Merit Sys. Prot. Bd., No. 2021-1693, 2022 U.S. App. LEXIS 7232 (Fed. Cir. 2022); Bannister v. Dep't of Veterans Affs., 26 F.4th 1340 (Fed. Cir. 2022); Keys v. Dep't of Hous. and Urb. Dev., No. 2021-2072, 2022 U.S. App. LEXIS 6046 (Fed. Cir. 2022); Murray v. Dep't of the Army, No. 2021-1560, 2021 U.S. App. LEXIS 26185 (Fed. Cir. 2021); Nagle v. U.S. Postal Serv., No. 2022-1306, 2022 U.S. App. LEXIS 18631); Rickel v. Dep't of the Navy, 31 F.4th 1358 (Fed. Cir. 2022); Staley v. Dep't of Veterans Affs., No. 2020-2127, 2021 U.S. App. LEXIS 20937 (Fed. Cir. 2021); Lalliss v. Dep't of Veterans Affs., 848 F. App'x 894 (Fed. Cir. 2021); Brown v. Dep't of the Air Force, No. 2021-2245, 2022 U.S. App. LEXIS 1602 (Fed. Cir. 2022); Bryant v. Dep't of Veterans Affs., 26 F.4th 1344 (Fed. Cir. 2022); Johnson v. Merit Sys. Prot. Bd., No. 2021-2136, 2022 U.S. App. LEXIS 26947 (Fed. Cir. 2022); Campion v. Dep't of Def., No. 2022-1236, 2022 U.S. App. LEXIS 12401 (Fed. Cir. 2022); Demery v. Dep't of the Army, 809 F. App'x 892 (Fed. Cir. 2020); Oram v. Merit Sys. Prot. Bd., 855 F. App'x 687 (Fed. Cir. 2021); Sistek v. Dep't of Veterans Affs., 955 F.3d 948 (Fed. Cir. 2020); Stern v. Dep't of Veterans Affs., 859 F. App'x 569 (Fed. Cir. 2021); Alford v. Merit Sys. Prot. Bd., No. 2021-2151, 2022 U.S. App. LEXIS 6323 (Fed. Cir. 2022); Knapp. v. Merit Sys. Prot. Bd., No. 2020-2122, 2021 U.S. App. LEXIS 34096 (Fed. Cir. 2021); McGhee v. United States, No. 2022-1082, 2022 U.S. App. LEXIS 9188 (Fed. Cir. 2022).

[187] *See Craft*, 860 F. App'x at 745-46 (concluding that retaliatory termination of workers' compensation benefits is within the scope of prohibited actions under the WPA and thus within MSPB's jurisdiction); *Conejo*, 2021 U.S. App. LEXIS 26341 at *7-10 (holding that retaliatory denial of promotion is clearly within the scope of prohibited actions under the WPA and thus within MSPB's jurisdiction).

[188] *See Doyle*, 855 F. App'x at 760-62 (applying the *Carr* factors and finding that the employer had failed to show any equivalent consequences for similarly situated employees who were not whistleblowers).

[189] *See Smolinski*, 23 F.4th at 1351-53 (finding that disclosures of an employer bullying and sexually harassing the alleged whistleblower's spouse would be protected under the WPA and thus within MSPB's jurisdiction); *Hessami*, 979 F.3d at 1367-70 (clarifying that MSPB should not weigh evidence in assessing whether an alleged whistleblower has pled sufficient factual material to constitute a protected disclosure); *Marana*, 2022 U.S. App. LEXIS 1603 at *10-12 (finding that MSPB had not adequately resolved factual questions about the protected status of the whistleblower's disclosures when it dismissed his WPA claim); *Tao*, 855 F. App'x at *721-22 (detailing various errors by the administrative law judge in concluding that the whistleblower had not made protected disclosures).

[190] *See McLaughlin*, 853 F. App'x at 649-50.

B. Unfavorable Outcomes for Whistleblowers

The cases in which the alleged whistleblowers lost can be summarized as follows: one case in which the protected disclosure was not a contributing factor for some challenged personnel actions and the employer successfully carried its burden for others,[191] seven cases where the alleged whistleblowers had not made protected disclosures under the WPA,[192] one case where the plaintiff's claim was precluded by res judicata,[193] three cases where the whistleblowers failed to prove that their disclosures were contributing factors in the challenged personnel actions,[194] one case where security clearance considerations made WPA concerns irrelevant,[195] one case where some of the whistleblower's disclosures were not protected and others were not contributing factors in the challenged personnel actions,[196] one case where the alleged whistleblower was not a federal employee,[197] two cases where the challenged personnel action was not one prohibited by the WPA,[198] two cases where the whistleblowers had not exhausted their administrative remedies through OSC,[199] and one case that was improperly filed in the United States Court of Federal Claims.[200]

---

[191] *See Alguard*, 2022 U.S. App. LEXIS 21409 at *10-12.

[192] *See Aubart*, 2022 U.S. App. LEXIS 1262 at *11-15; *Finizie*, 2022 U.S. App. LEXIS 32735 at *5-8; *Gessel*, 2022 U.S. App. LEXIS 1387 at *7-12; *Miranne*, 2021 U.S. App. LEXIS 30261 at *6-10; *Oram*, 2022 U.S. App. LEXIS 7627 at *4-8; *Young*, 2020 U.S. App. LEXIS 1323 at *1326-30; *Lentz*, 2022 U.S. App. LEXIS 30662 at *14-23.

[193] *See Brown*, 2022 U.S. App. LEXIS 1601 at *3-5.

[194] *See Bryant*, 26 F.4th at 1348; *Johnson*, 2022 U.S. App. LEXIS 26947 at *9-13; *Hobson*, 2022 U.S. App. LEXIS 7232 at *4-7.

[195] *See Campion*, 2022 U.S. App. LEXIS 12401 at *3.

[196] *See Demery*, 809 F. App'x at 896-900.

[197] *See Oram*, 855 F. App'x at 689-90.

[198] *See Sistek*, 955 F.3d at 954-55; *Stern*, 859 F. App'x at 571-73.

[199] *See Alford*, 2022 U.S. App. LEXIS 6323 at *4-5; *Knapp*, 2021 U.S. App. LEXIS 34096 at *7-8.

[200] *See McGhee*, 2022 U.S. App. LEXIS 9188 at *2-3.

The higher proportion of favorable to unfavorable decisions in the Federal Circuit may indicate that the ACRA is functioning as intended by demonstrating to the Federal Circuit that its interpretation of the WPA needed to become more whistleblower-friendly. Furthermore, the regional circuits' hesitance suggests that the Federal Circuit remains the intellectual leader in the area of federal employee whistleblower protections. By signaling to the regional circuits that it has reconsidered its position toward whistleblowers, the Federal Circuit may be able to initiate a wider shift through leading by example.

V. Conclusion

It remains to be seen whether the ACRA will finally vindicate the goals contemplated from the earliest enactments of federal whistleblower protections because the regional circuits are hesitant to disrupt decades of precedent. However, promising signals in the First Circuit and Seventh Circuit may pave the way for incremental change. The other regional circuits should follow their example and engage in more searching analysis of statutory whistleblower protections to assess whether they believe that the Federal Circuit's case law has adequately vindicated those protections. Unlike many other areas of the law, Congress has explicitly stated that the regional circuits should create a split to place their decisions in critical conversation with each other and ultimately develop a stronger body of protections. It is far past time for the courts to fulfill their role in accomplishing the CSRA's lofty goals.

Applicant Details

First Name	**Haeeun**
Last Name	**Jee**
Citizenship Status	**U. S. Citizen**
Email Address	**hjee@jd24.law.harvard.edu**
Address	**Address** Street **23 Ware St., Apt 5** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**8185235593**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Human Rights Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Goldsmith, Jack
jgoldsmith@law.harvard.edu
617-384-8159
Minow, Martha
minow@law.harvard.edu
617-495-4276
Greiner, James
jgreiner@law.harvard.edu
617-496-4643

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Blessing Haeeun Jee
23 Ware St. #5, Cambridge, MA 02138 • 818-523-5593 • hjee@jd24.law.harvard.edu

June 12, 2023

The Honorable Jamar K. Walker
The U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to apply for a clerkship in your chambers for the 2024-2025 term. I just completed my second year at Harvard Law School and work as a Civil Procedure teaching assistant and as an articles editor for the *Harvard Human Rights Journal*. I will be clerking on the 9th Circuit in Judge Eric Miller's chambers for the 2025-2026 term.

Several experiences have sharpened my skills in legal research, analysis, and writing. As a research assistant for Prof. Martha Minow, I analyzed recent developments in education law, and as a teaching assistant for Prof. Jim Greiner, I wrote case notes for significant civil procedure cases that became a part of the class curriculum. Last summer at EarthRights International, I worked on research memos and oral arguments for transnational cases in federal courts, and I am building on those complex litigation skills at Quinn Emanuel and the Department of Justice (Federal Programs Branch) this summer.

Enclosed you will find my resume, law school transcript, and writing sample. The following people are submitting letters of recommendation separately and welcome inquiries in the meantime:

Prof. Martha Minow	Prof. Jack Goldsmith	Prof. James Greiner
minow@law.harvard.edu	jgoldsmith@law.harvard.edu	jgreiner@law.harvard.edu
617-495-4276	617-384-8159	617-496-4643

In addition, the following people have agreed to be additional references, if that is helpful in any capacity, and also welcome inquiries:

Prof. Vicki Jackson	Prof. Caitlin Millat
vjackson@law.harvard.edu	caitlinmillat6@gmail.com
617-496-2050	321-217-5614

I would be honored to contribute my skills to the important work of your chambers. Thank you very much for your consideration.

Yours truly,
Blessing Haeeun Jee

Blessing Haeeun Jee

23 Ware St., #5, Cambridge, MA 02138 • 818-523-5593 • hjee@jd24.law.harvard.edu

EDUCATION

Harvard Law School, J.D. Candidate, May 2024 (Expected)
Honors: Dean's Scholar Prizes in Civil Procedure, Torts, Taxation, International Arbitration, Workshop on Law and Political Economy, and Business & Human Rights
Activities: Research Assistant for Professors Martha Minow (civil rights) and Jack Goldsmith (federal courts)
Teaching Fellow for Professors Jim Greiner (Civil Procedure) and Larry Schwartztol (Civil Procedure)
Harvard Human Rights Journal, Article Editor
Public Law Workshop with Dean John Manning and Professor Martha Minow

Harvard College, A.B. *cum laude* in Sociology and Citation in Spanish, May 2018
Honors: George Caspar Homans Prize, awarded to a Kirkland House senior for excellence in the social sciences
Cyrilly Abels Short Story Prize, awarded by English Department for best short story written by a female undergraduate
Harvard Foundation for Intercultural and Race Relations Certificate of Recognition
John Harvard Scholar (awarded to top 5% of each academic class based on GPA), for 2017 and 2018
Activities: Harvard Asian American Women's Association, *Co-Founder and President*
Small Claims Advisory Service (student organization to assist small claims litigants), *Volunteer*
Professor Paul May, *Research assistant on migration and multiculturalism in Europe*

EXPERIENCE

Department of Justice, Civil Division, Federal Programs Branch, Washington, D.C. July–August 2023
Summer Law Intern (incoming)

Quinn Emanuel Urquhart & Sullivan, Washington, D.C. May–July 2023
Summer Associate
Drafted complaints regarding violations of the False Claims Act. Conducted research on constitutional law for appellate briefs. Prepared attorneys for depositions and for meetings with the FDIC, the DOJ, and the SEC.

EarthRights International, Washington, D.C. Summer 2022
Legal Intern
Wrote memoranda on civil procedure and evidentiary issues for transnational human rights cases. Analyzed foreign caselaw regarding jurisdictional immunity of international organizations. Observed proceedings in federal district court.

Organization of American States, Washington, D.C. (Remote) Fall 2020
Intern
Executed meetings between Member States for the Work Plan by the Inter-American Committee on Education. Managed partnerships with organizations such as the Pan American Health Organization and Massachusetts Institute of Technology.

Spanish Ministry of Education, Spain 2018 – 2020
North American Language and Culture Assistant
Taught English language and U.S. culture at a primary school in Galicia, Spain. Executed lesson plans incorporating topics such as the history of music, U.S. civics, and racial politics in a secondary school in Murcia, Spain.

The Bronx Defenders, Bronx, NY Summer 2017
Investigative Intern
Investigated facts of the case, interviewed witnesses, and collected video surveillance to assist indigent clients in their misdemeanor charges at a holistic public defense non-profit organization.

U.S. Department of Housing and Urban Development, Washington, D.C. Summer 2016
Intern
Directed an initiative to improve services to Limited English Proficiency individuals. Drafted the agency's Language Access Plan.

Los Angeles County District Attorney's Office, Los Angeles, CA Winter/Spring 2016
Volunteer Law Clerk
Investigated a high-profile insurance fraud case, drafted court motions, and assisted Deputy District Attorneys for trial.

PERSONAL

Native Korean speaker, fluent in Spanish. Traveled to over 20 countries, camped at numerous National Parks. Watches the NBA and British TV, predicts people's Meyers-Brigg's type, and appears in the Acknowledgement section of three books.

arvard Law School

ate of Issue: June 6, 2023
ot valid unless signed and sealed
age 1 / 2

Record of: Haeeun Jee
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

)00	Civil Procedure 2 Greiner, D. James * Dean's Scholar Prize	H*	4
)01	Contracts 2 Kennedy, Randall	H	4
)06	First Year Legal Research and Writing 2B Millat, Caitlin	H	2
)03	Legislation and Regulation 2 Freeman, Jody	P	4
)04	Property 2 Mann, Bruce	H	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

)55	Introduction to Trial Advocacy Newman, Thomas	CR	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

)24	Constitutional Law 2 Jackson, Vicki	H	4
)02	Criminal Law 2 Lanni, Adriaan	H	4
)06	First Year Legal Research and Writing 2B Millat, Caitlin	P	2
)05	Torts 2 Davis, Seth * Dean's Scholar Prize	H*	4
l33	Workshop on Law and Political Economy Benkler, Yochai * Dean's Scholar Prize	H*	2

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 37

Fall 2022 Term: September 01 - December 31

l66	Business and Human Rights Seminar: Evolution and Contemporary Challenges Portugal Gouvea, Carlos	H*	2
	* Dean's Scholar Prize		
2086	Federal Courts and the Federal System Goldsmith, Jack	H	5
2973	Foundations of International Arbitration: Theory and Practice Sobota, Luke * Dean's Scholar Prize	H*	2
2212	Public International Law Modirzadeh, Naz	P	4
3048	Reforming the American Constitution Levinson, Sanford	CR	1

Fall 2022 Total Credits: 14

Fall-Spring 2022 Term: September 01 - May 31

3500	Writing Group: The Original Constitution Sachs, Stephen	CR	1

Fall-Spring 2022 Total Credits: 1

Winter 2023 Term: January 01 - January 31

7000W	Independent Writing Sachs, Stephen	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

2000	Administrative Law Vermeule, Adrian	P	4
2310	Federalism and States as Public Law Actors Halligan, Caitlin	H	2
2213	Public Law Workshop Minow, Martha	H	2
2234	Taxation Warren, Alvin * Dean's Scholar Prize	H*	4

Spring 2023 Total Credits: 12
Total 2022-2023 Credits: 29

Fall 2023 Term: August 30 - December 15

3161	Constitutional Dimensions of the Administrative State: Comparative Perspectives Jackson, Vicki	~	1
2035	Constitutional Law: First Amendment Weinrib, Laura	~	4

continued on next page

Assistant Dean and Registrar

arvard Law School

Record of: Haeeun Jee

ate of Issue: June 6, 2023
ot valid unless signed and sealed
age 2 / 2

)69	Employment Law Sachs, Benjamin	~	4
l69	Legal Profession: Collaborative Law Hoffman, David	~	3
206	Private Law Workshop Smith, Henry	~	2
	Fall 2023 Total Credits:		14
	Spring 2024 Term: January 22 - May 10		
)79	Evidence Lvovsky, Anna	~	4
l95	Negotiation Workshop Heen, Sheila	~	4
	Spring 2024 Total Credits:		8
	Total 2023-2024 Credits:		22
	Total JD Program Credits:		88

nd of official record

HARVARD LAW SCHOOL
VE RI TAS
LEX ET JUSTITIA
OFFICE OF THE REGISTRAR

Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Blessing Haeeun Jee for a clerkship in your chambers.

Blessing went to Harvard College (where she majored in Sociology) and has done very well at Harvard Law School, with six Dean's Prizes in two years. One of those Dean's Prizes came in my hard Federal Courts class. Blessing stood out in class and in office hours for her good (and probing) questions, and she wrote an excellent exam that showed real mastery of the course.

Based on her class performance I asked Blessing to do research for me. I asked her to catalogue the various areas of law prior to Erie that were governed by "general law," and also to figure out the contexts in which the pre-Erie federal courts ruled that they lacked subject matter jurisdiction in cases arising under general law. She did a great job. She well understood the questions, her research was comprehensive, and she presented the material very clearly. It was exactly what I wanted.

I am confident that Blessing will make a great law clerk. In addition to her intelligence and legal skills, she is exceedingly kind, upbeat, and generous. She always carries a smile. One can tell immediately and in every encounter that she is a fair-minded person of integrity committed to doing the right thing. It was apparent to me from Blessing's many office visits related to class, and in her research for me, that's she is committed to excellence in her work. And while she has done very well in law school, she is not close yet to reaching her potential. She came to law school without any sense of law or the legal profession, and she has done well through super-hard work and because she is so bright. She has more confidence now than a year ago, and it shows in her work and in our legal discussions. That trajectory will continue for a while, I am confident.

Blessing wants to clerk because she sees it as an act of public service. I hope you take her application seriously.

Sincerely,

Jack L. Goldsmith

Jack Goldsmith - jgoldsmith@law.harvard.edu - 617-384-8159

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Blessing Haeeun Jee is spectacularly talented, analytically sharp, hard-working, eloquent, wise, and big-hearted; she would be a terrific law clerk, and I am so pleased to recommend her. You can see from her transcript that she has excelled across a wide range of courses during law school. I can also attest that she gives her all—which is considerable—to everything she undertakes, and never takes a shortcut. She holds integrity and honesty dear and with legal research assignments, she is always thorough, detail-oriented, and devoted to service.

I have known Blessing as a law student and as my research assistant both during and before she entered law school. I selected Blessing from dozens of highly impressive Harvard undergraduates applying to work with me as a research assistant and intellectual partner while I worked as a fellow at the Radcliffe Institute on a book manuscript about the role of forgiveness in the law. Blessing brought rigor, creativity, and clarity to the work related to a book I was writing at the time, When Should Law Forgive? Although it was her first exposure to legal research and writing, her work proved invaluable. She produced useful, well-written, and well-documented research memoranda on international legal treatment of child soldiers and on legal rules and practices around amnesty for criminal conduct. She recommended areas of focus and promising innovations. She offered careful and perceptive comments on my draft chapters. She showed a terrific ability to attend to details and to the big picture at the same time.

Together, we had memorable conversations about similarities and differences between interpersonal forgiveness and potential uses of discretion, expungements, and pardons in the criminal justice system. We also discussed the risk of racial and other biases hidden in algorithms used in criminal justice and commercial institutions. She provided examples from social media, and also shared insights from her sociology seminar on social trauma, reflections on challenges addressing sexual assault on campus, and short supply of apologies and reconciliation between campus organizations with little institutional memory. She worked collaboratively with five other student researchers. Amid the very talented group, she stood out as someone with great maturity, quiet leadership, and abilities to overcome differences and build social bonds. Intellectually curious, analytically sharp, and accomplished in coursework and leadership, she became a sought-after prospective law student. She was readily admitted through the exceedingly selective admissions program Harvard Law School uses to recruit extraordinary college juniors.

She devoted the two years before law school (work in the world is required for students in that early admission program) teaching English in Spain. We remained in touch and when she offered to continue help with my legal research, I jumped at the possibility; she has continued to provide stellar research assistance over the past five years. She gave a rigorous, critical reading of a draft paper on analyzing contrasts in legal and policy meanings of “equity” and “equality.” Her research memoranda and comments considerably improved my review article on a complex case (Little Sisters of the Poor v. Pennsylvania) that includes statutory and administrative law issues as well as religious accommodation issues affecting access to contraceptive care under employer-funded health insurance. She also offered instructive comments as I drafted a lecture on potential relationships between restorative justice practices and work to tackle racism. Recently, her work provided surveys of legal developments involving educational quality and access in the 50 years since the Supreme Court’s decision in San Antonio v. Rodriguez. I am always confident she has turned over every stone when given a research task. She also offers constructive suggestions in revising drafts on matters ranging from grammar and footnote citations to transitions in steps of an argument and conceptual issues.

This past year, Dean John Manning and I selected her from some 70 applicants to join a small group of students in the Public Law Workshop. Students receive course credit for their participation in a weekly discussion of a scholarly work-in-progress with authors from law faculties across the country and in one case, from England. Writing written questions and comments on the papers and participating in intensive discussions of the papers with faculty and student participants, the students enrolled in the course also write a paper building on or criticizing one of the scholarly papers. Blessing’s paper thoughtfully analyzed the relationship between textualism and precedential uses of judicial interpretations of statutes. In addition, each week, she demonstrated total immersion in and insightful comments about a wide range of papers, ranging across discussions of textualism and originalism, consideration of comparative legal analysis of judicial review practices, methodological dimensions of an empirical analysis of predictions related to Supreme Court precedents, and analytic distinctions in competing meanings of racial neutrality in the context of affirmative action. She showed real dexterity in taking apart and reassembling ideas and arguments, grappling with internal tensions and incoherencies, and developing a big-picture view of trends in the law.

During law school, she has balanced course work and research work for me and for Professor Jack Goldsmith with her role as Article Editor for the Harvard Human Rights Journal and her work as an active mentor in Asian Pacific American Law Students Association and the Korean Association of Harvard Law School. Her intellectual curiosity and her excitement about learning new areas of law and new developments in familiar areas is contagious. Her summer work experiences and her participation in the upper-level moot court confirm her commitment to and fascination with legal work. She likes nothing better than spending hours tackling tough legal issues and going through multiple rounds of editing in relation to moot court briefs, law review articles, and other legal work.

Blessing has already shown great intelligence, discipline, and judgment, as her resume and transcript suggest. Less obvious,

Martha Minow - minow@law.harvard.edu - 617-495-4276

though, may be her generosity and big heart. I have seen her offering comfort and reassurances to other students. I have watched her draw meaningful insights from experiences here, in her travels, and in her personal life. She discovered her passion for law when her mother—an immigrant—asked her to help another immigrant mother navigate the special education system when a school announced it could no longer serve her son. Blessing became an expert in state special education law and successfully advocated for that student while assisting the mother across cultures and languages. Her experiences have made her especially appreciate the American tradition of inclusiveness and openness to newcomers.

Given the chance, I would hire Blessing again and again. I recommend her most highly and I am confident she will be a treasured law clerk.

Sincerely,

Martha Minow
300th Anniversary University Professor
Former Dean
Harvard Law School

June 16, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to support the law school application of Haeeun "Blessing" Jee for a clerkship in your chambers.

A brief word of introduction: I am a professor of law in my sixteenth year of teaching. Before starting as an academic, I clerked for the Honorable Patrick E. Higginbotham on the United States Court of Appeals for the Fifth Circuit. After the clerkship, I spent six years as a litigator in Washington, D.C., three for the Department of Justice, and three for the law firm of Jenner & Block. My practice focused on redistricting, constitutional, agency, and employment discrimination class action cases. In 2002, I returned to graduate school and emerged five years later with my Ph.D. in statistics. My current research involves the application of modern quantitative methods to problems in and around legal practice and adjudicatory systems, particularly the construction and implementation of randomized field experiments in the areas of access to justice and adjudicatory administration. My work has appeared, in among other places, Science, the Yale Law Journal, the Harvard Law Review, the Journal of the Royal Statistical Society (Series A), the Quarterly Journal of Political Science, the Review of Economics and Statistics, Jurimetrics, and the Proceedings of the National Academy of Sciences. Perhaps most importantly for your purposes, I have participated in the hiring processes of Judge Higginbotham's chambers, the Department of Justice, Jenner & Block, and Harvard Law School.

I am in a strong position to comment on Blessing's skills. Blessing took Civil Procedure with me in the fall of 2021; I was also the section leader for her group of 80 students, so I got to know her reasonably well. In the fall of 2022, Blessing served as a teaching assistant in that year's iteration of Civil Procedure. As a result of these interactions, I can evaluate Blessing's writing, oral presentation, and research, as well as her ability to work in teams (with her fellow Civil Procedure TAs) and individually.

Blessing is the most creative and hardest-working student I will recommend this year. When I asked her what she would want a judge to know about her when considering her file, she replied, "I would like a judge to know that I never do things half-heartedly or take the shortcut . . . his means: I will put in those extra 15 hours on WestLaw until I feel I have thoroughly mined the caselaw for the research question and feel confident attaching my name to a memo." That has been my experience with Blessing as a student and a TA.

As a student, Blessing simply outworked her peers. Sensing early the complexity of Civil Procedure doctrine and the difficulty of my course (I teach many non-standard concepts in addition to the usual jurisdiction, federal rules, and preclusion), she came to nearly every office hours session either I or the class TAs offered. She came prepared with her questions already formulated. She also listened to questions from her classmates, and added follow-ups that sometimes explored areas of Civil Procedure doctrine the course did not cover. She was inquisitive and intellectually aggressive. She was also courteous, kind, optimistic, and funny. Later, one of her classmates described having an "intellectual crush on Blessing."

In the fall of 2022, Blessing was my most effective TA. For her regular duties, she provided feedback on a draft assignment; composed a model answer; provided individualized comments on 40 assignment responses; met with students 1-1; and held office hours. She also undertook a course improvement project in the form of providing introductions and appendices to cases that I use each semester that are not in the casebook. That process required creativity. Blessing's introductions placed each case in its legal, historical, and in some instances its broader social context. For example, in case law I use to demonstrate the transition from the First Restatement to the Second Restatement approach to conflicts of laws, Blessing composed an introduction highlighting how the former's "law of the place of the accident" rule in torts assigned dispositive significance to seemingly arbitrary events, such as where a train decoupled or where an airplane crashed. But she also introduced the subjectiveness and unbridled discretion attendant to the Second Restatement's multi-factored approach. As a result, students encountering, for example, Babcock v. Jackson for the first time had strong grounding in the strengths and weaknesses of the doctrine the court articulated before tacking the holding.

Meanwhile, 1Ls craved Blessing's attention. Her sense of humor, her patience, and the clarity of her explanations made Blessing too popular as a TA. I had to insist that not everyone who asked for one-one sessions with her could have them, as there simply were not enough hours in her day.

Blessing came to law through her experience preparing her first public interest advocacy file as a college student for a friend of her mothers who spoke little English (Blessing is first-generation Korean). I have had students with similar experiences, but each of them have possessed some experience in law before preparing a legal file on their own. Not so Blessing. She researched and created a strategy for a mildly autistic student to remain in a mainstream classroom with no prior exposure to law. That experience induced her to intern at a legal office, and then come to law school. I am grateful to the world for steering Blessing in my direction.

Blessing will make an outstanding clerk. You will enjoy each day-to-day interaction with her. I recommend her to you. Please do not hesitate to contact me if you require further information.

Sincerely,

James Greiner - jgreiner@law.harvard.edu - 617-496-4643

D. James Greiner

James Greiner - jgreiner@law.harvard.edu - 617-496-4643

Blessing Haeeun Jee
23 Ware St. #5, Cambridge, MA 02138 • 818-523-5593 • hjee@jd24.law.harvard.edu

WRITING SAMPLE

For Judge Caitlin Halligan's seminar this last spring, "Federalism and States as Public Law Actors," I wrote my final paper as a judicial opinion for a case currently on appeal to the U.S. Court of Appeals for the Second Circuit (*New York State Communications, Inc. v. Letitia A. James*, No. cv-21-1975). The case involves a challenge to the Affordable Broadband Act, a New York state law seeking to implement pricing levels on broadband internet service provided to qualifying low-income New York residents.

The plaintiffs, a group of trade associations for broadband service providers, successfully sued in the U.S. District Court for the Eastern District of New York to enjoin the Act from taking effect. The State of New York appealed. The question on appeal is whether the Act was preempted by the federal Communications Act of 1934 and an Order of the Federal Communications Commission in 2018 reclassifying broadband services.

Oral arguments suggested that the panel may dismiss the case on grounds of unreviewability, but I wrote this judicial opinion on the assumption that reviewability is met.

Please note that this is my own work product and has not been substantially edited by another person.

cv-21-1975
United States Court of Appeals for the Second Circuit

New York State Telecommunication, Inc. v. Letitia A. James
On Appeal from the United States District Court for the Eastern District of New York

Jane Doe, Circuit Judge:

The question presented in this case is whether the Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzz, which would require certain broadband internet providers to offer qualifying low-income New Yorkers high-speed broadband service at certain pricing levels, is preempted by the federal Communications Act of 1934 (as amended by the Telecommunications Act of 1996) or the 2018 Order of the Federal Communications Commission (FCC) reclassifying broadband internet services as Title I "information services," rather than Title II "telecommunication services."

Defendant is Letitia A. James, sued in her official capacity as the New York State Attorney General. Plaintiffs are a group of trade associations whose members provide broadband internet service to New Yorkers.

Plaintiffs allege the Affordable Broadband Act is conflict- and field-preempted by the Communications Act and the FCC's 2018 Order. The Plaintiffs moved for preliminary injunction in the United States District Court for the Eastern District of New York to bar Defendant James from enforcing the Affordable Broadband Act. The District Court (Hurley, J.) granted the motion, holding that Plaintiffs would suffer irreparable harm otherwise, that their preemption claims would be likely to succeed on the merits, and that the injunction would serve the public interest. The District Court entered an order for preliminary injunction.

New York timely appealed the District Court's order, and then stipulated to entry of a permanent injunction and a declaration that federal law preempts the ABA, which the District

Court entered. New York then timely appealed and dismissed its appeal of the order granting the preliminary injunction.

We hold that the ABA is not preempted by the Communications Act. Accordingly, we conclude that the permanent injunction was improperly granted by the District Court because the Plaintiffs would not be likely to succeed on the merits. We reverse its judgment and remand for further proceedings.

I. BACKGROUND

The New York State Affordable Broadband Act (the "ABA") was signed into law on April 16, 2021. Its stated purpose is to ensure that all New Yorkers have access to affordable Internet. It regulates every broadband service provider operating in New York, except those serving no more than twenty thousand households and whose compliance would "result in unreasonable or unsustainable financial impact." N.Y. Gen. Bus. Law § 399-zzzzz(5).

For providers who *are* subject to the law, the ABA mandates that they offer at least two Internet plans to qualifying low-income households, [1] one with download speeds of at least 25 megabits-per-second at no more than $15-per-month, and one with downloads speeds of at least 200 megabits-per-second at no more than $20-per-month. *Id.* § 399-zzzzz(2)–(4). Providers may only raise prices according to a statutory formula. *Id.* The ABA empowers the New York State Attorney General, Defendant Letitia A. James, to seek injunctive relief against and civil penalties from any noncompliant provider. *Id.* § 399-zzzzz(10).

Two weeks after the ABA was signed into law, Plaintiffs filed suit in the United States District Court for the Eastern District of New York against Defendant James, seeking a

[1] Households qualify if they receive an affordability benefit from a utility or if they are eligible for the National School Lunch Program, the Supplemental Nutrition Assistance Program, Medicaid, the Senior Citizen Rent Increase Exemption, or the Disability Rent Increase Exemption. N.Y. Gen. Bus. Law § 399-zzzzz(2).

declaration that federal law preempted the ABA and both a preliminary and permanent injunction to bar Defendant James from enforcing the ABA. In a memorandum and order dated June 11, 2021, the District Court found that the Plaintiffs' preemption claims were likely to succeed on theories of conflict and field preemption: that the ABA conflicted with the implied preemptive effect of the 2018 Order, and that the field of interstate communications was found occupied by federal law. The District Court granted the preliminary injunction and later entered a stipulated final judgment, declaring the ABA to be federally preempted and permanently enjoining its enforcement.

New York appealed the District Court's grant of the permanent injunction. Because we conclude that federal law does not preempt the ABA, we REVERSE.

II. DISCUSSION

A. Standard of Review

Circuit courts "review *de novo* a district court's application of preemption principles." *New York SMSA Ltd. v. Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) (per curiam).

B. The Classification of Broadband Internet Service by the Federal Communications Commission Delineates the Commission's Jurisdictional Authority

The Communications Act grants the FCC the jurisdiction and authority to regulate interstate communications. 47 U.S.C. § 152(a). The FCC can classify "various [communication] services into the appropriate statutory categories." *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019). Under Title II of the Communications Act, the FCC has the authority to impose common-carrier regulations on services they classify as "telecommunications services," *see* 47 U.S.C. § 153(53). Under Title I, the FCC has only "ancillary authority" to promulgate regulations that further its responsibilities under *other* titles of the Act. *Mozilla*, 940 F.3d at 76;

see also Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014) (holding that FCC lacked authority to impose common-carrier requirements on broadband providers because it classified them under Title I, not Title II). These classifications are treated as "mutually exclusive" by the FCC. *Mozilla*, 940 F.3d at 19.

For a period between 2015 and 2018, the FCC classified broadband internet as a "telecommunications service" under Title II. [2] But for most of relevant history,[3] and since 2018, the FCC has classified broadband internet as an "information service" under Title I. *See* 47 U.S.C. § 153(24); *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, P 2 (2018). These classifications are crucial to the preemption analysis since they delineate the FCC's statutory authority, and "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

As a preliminary matter, the court takes the view that the ABA involves interstate communications. If the ABA only regulated intrastate communications, there would be no preemption issue. (This is because the FCC does not have statutory authority to regulate intrastate communications, *see* 47 U.S.C. § 152(b), and again, without statutory authority, it lacks preemptive authority.) But the ABA *does* implicate interstate communications. This is because while the ABA only seeks to regulate in-state pricing, it covers broadband internet communications involving "all Internet endpoints." N.Y. Gen. Bus. Law § 399-zzzzz(1). This "all Internet endpoints" language, which derives from the FCC's definition of broadband service, anticipates that the ABA will not be limited to broadband communication between only New York endpoints. (Some endpoints will almost surely be located in states other than New York.)

[2] *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015).
[3] *See, e.g.*, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

And the determination of whether something is interstate relies on "the nature of the communication itself rather than the physical location of the technology." *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d. Cir. 1980) (finding this to be the "key" to determine the FCC's jurisdiction). New York also seems to have conceded in their appellate briefs that the ABA affects interstate communications. Appellant Reply Br. 10 n.5.

C. The ABA is Not Federally Preempted

1. Field preemption

States are entirely precluded from regulating in a field that Congress has determined to be its exclusive domain of regulation. *See Arizona v. United States*, 567 U.S. 387, 399 (2012). Congress's intent to displace state law can be inferred from a "framework of regulation 'so pervasive… that Congress left no room for the States to supplement it' or where there is a 'federal interest… so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Normally, we start "with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Plaintiffs argue that this presumption against preemption should not apply here because telecommunications services has constituted a field "where there has been a history of significant federal presence." *N.Y. SMSA Ltd. P'ship*, 612 F.3d at 104 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *accord Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (declining to apply the presumption against preemption because of "long history of federal presence in regulating long-distance telecommunications").

Putting aside the repetitive nature of this approach,[4] and even conceding the significant federal presence in the field of telecommunications services, the law is not settled on whether substantial federal law in a field necessarily eradicates the presumption. In *Wyeth v. Levine*, 555 U.S. 555 (2009), "the Supreme Court recently relied on the presumption [against preemption] in a pharmaceutical failure-to-warn case, even though the federal government has regulated drug labeling for many years." *N.Y. SMSA Ltd. P'ship*, 612 F.3d at 104 (describing *Wyeth*). The *Wyeth* court asserted that the rationale behind the presumption was respect for states as independent sovereigns, and "the presumption thus accounts for the historic presence of state law but *does not rely on the absence of federal regulation*." 555 U.S. at 565 n.3 (emphasis added).

Next, Plaintiffs further argue that the presumption does not apply because the historic powers of the state are not implicated. Plaintiffs frame the ABA as a rate-regulation law, and argue that there is "no historic presence of state law regulating the rates of interstate communications services." Appellee Br. 43. New York, in turn, argues that the ABA is simply an example of a state law regulating consumer protection and "enforcing fair business practices." Appellant Br. 28 (quoting the 2018 Order ¶ 196). In essence, New York argues that ABA's rate regulation—or what resembles rate regulation here—is a form of consumer protection regulation encompassed in the traditional police powers of the state. We agree. The purpose of the ABA, to provide broadband internet service to qualifying low-income New Yorkers, is aligned with other consumer protection laws that seek to root out unfair practices. While we do not hold categorically that all state pricing regulations are "consumer protection" laws, the ABA is an

[4] We find it to be a duplicative exercise. One would assert the existence of federal occupation of a field to first eliminate the presumption, and then *again* assert the existence of federal occupation to determine field preemption. This "double-dipping" has little appeal and seems to eliminate the presumption altogether.

exercise of traditional state power. It is a close question, but we will apply the presumption against preemption here.

With this presumption in mind, we begin with defining the "field" for our field preemption analysis. Two fields are suggested. The District Court defined the field as laws governing "interstate communications services." On appeal, Plaintiffs narrowed the field to "rate regulation of interstate communications services." Appellee Br. 13. In either case, there is no federal preemption there.

There is no federal preemption in the field of "interstate communications services" because there is an undisputable presence of state law spanning various types of regulations and communications services—and many provisions of the Communications Act expressly anticipate state regulation of communications services, including broadband providers.

The Communications Act grants regulatory jurisdiction to the FCC over "all interstate and foreign communication by wire or radio… and to all persons engaged within the United States in such communication." 47 U.S.C. § 152(a). But the "mere existence" of federal regulatory authority does not imply field preemption. *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990). Even if the regulatory scheme is "comprehensive," preemption must be implied from "specific provisions of the federal statute." *Head v. N.M. Bd. of Examiners in Optometry*, 374 U.S. 424, 432 (1963). There are no specific provisions here that preempt states from regulating in this space.

Recently, the Ninth Circuit rejected a field preemption claim hinging on § 152. *ACA Connects v. Bonta*, 24 F.4th 1233, 1247–48 (9th Cir. 2022). The court there found that the FCC had left room for "state laws to supplement the federal scheme." *Id.* at 1248. In fact, states *have* been regulating alongside the federal government in the field of interstate communications, and

courts have found no preemption. The examples are numerous; the regulations focus on consumer protection and span the realm of interstate communications. *See Head*, 374 U.S. 424 (1963) (radio advertisements); *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006) (interstate phone calls); *People v. Charter Commc'ns, Inc.*, 81 N.Y.S.3d 2 (App. Div. 2018) (false broadband advertising); *ACA Connects v. Frey,* 471 F. Supp. 3d 318 (D. Me. 2020) (personal information on broadband); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (taxes on interstate calls).

Thus, the field of interstate communications services has *not* been "so comprehensively [occupied by federal law] that it has left no room for supplementary state legislation." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1480–81 (2018) (quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986)). For decades, state regulations of many types have been implemented—and have been upheld against preemption challenges—in the field of interstate communications.

Plaintiffs rely on *La. Pub. Serv. Comm'n v. FCC* for the purported proposition that the Communications Act gives the FCC "plenary authority" over interstate communications services, but *Louisiana* does not stand for this. The *Louisiana* Court did not assert wholesale that the Communications Act gave the FCC "plenary authority" over interstate communications. 476 U.S. at 360. In fact, the Court seemed to have anticipated concurrent jurisdiction based on the unavoidable overlap of intra- and interstate communications:

> …while the Act *would seem* to divide the world into two hemispheres—one comprised of interstate service, over which the FCC *would have* plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—*in practice*, the realities of technology and economics belie such a clean parceling of responsibility.

Id. (emphases added). And while Plaintiffs are correct that a part of the holding of *La. Pub. Serv. Comm'n* was focused on intrastate regulations—that federal law was barred from preempting the intrastate ratemaking—the *Louisiana* Court explicitly, on the issue of § 151's grant of power,[5] addressed interstate communications as well. The Court said that the "express jurisdictional limitations on FCC power contained in § 152(b)" disinclined them from accepting the broad reading of § 151. The Court concluded that the two sections were best reconciled to create a "*dual* regulatory system" for interstate telecommunications services. *Id*. at 370; *see also Mozilla Corp.*, 940 F.3d at 81 (noting the Communications Act's "vision of dual federal-state authority").

In the same way, there is also no preemption even if we narrow the field to *pricing regulation of* interstate communications services. There is no clear Congressional intent for this field to be exclusively occupied by the federal government. As discussed earlier, the mere fact of § 152's grant of federal regulatory jurisdiction does not "by itself provide a source of preemption authority." *Mozilla*, 940 F.3d at 78. In fact, § 152(a) does not discuss pricing or rate regulation; later titles of the Act do so. And even so, there is great variety in how pricing or rate regulation is treated across the titles. *See* Appellant's Br. 11 (discussing how Title II has "robust ratemaking provisions," while Title III "contains almost no such provisions" and Title V-A "takes a middle ground"). The lack of a clear, unified Congressional approach militates against finding this field federally preempted.

Furthermore, the provisions of the Communications Act themselves counsel against a finding of field preemption. The Act's "savings clause" ensures that nothing in the Act "shall in any way abridge or alter the remedies not existing at common law or by statute, but the provisions of [the Act] are in addition to such remedies." 47 U.S.C. § 414. This court found in

[5] Like section 152(a), section 151 lays out the purpose of the Act and the role of the FCC.

Marcus v. AT&T Corp. that section 414 was evidence of Congress's intent to allow some state law claims to proceed. 138 F.3d 46, 54 (2d Cir. 1998); *see In re NOS Communications, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007) ("A savings clause is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field of telecommunications regulation, there would be nothing for section 414 to 'save,' and the provision would be mere surplusage.").

The Communications Act also imagines state "regulatory jurisdiction over telecommunications services," under which states may employ "price cap regulation" as part of the "deployment… of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). Clearly, this provision evinces Congress's intent that states retain some concurrent jurisdiction in telecommunications services, which, according to that same provision, include broadband services. *Id.* § 1302(d)(1). We find no field preemption because "the purpose of Congress is the ultimate touchstone in every pre-emption case," *Wyeth*, 555 U.S. at 565 (quotation marks omitted).

2. Conflict preemption

Conflict preemption exists if "'compliance with both state and federal law is impossible' or [if] 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citation omitted). No one claims that it would be impossible to comply with both the ABA and the federal non-regulation of broadband prices. As such, we focus on the District Court's conclusion that the ABA stands as an obstacle to the FCC's deregulatory policy embodied in the 2018 Order.

Plaintiffs believe that ABA's pricing regulation directly conflicts with the 2018 Order reclassifying broadband services as Title I information services, because according to them, the ABA chafes against the FCC's express determination that such rate regulation is "contrary to the federal policy of promoting broadband deployment while preserving an open internet." Appellee Br. 17.

But does the 2018 Order even have preemptive effect?[6] It is settled principle that preemption may only exist if the agency is acting within the scope of its congressionally delegated authority. *See Mozilla*, 940 F.3d at 74–75. As such, whether the FCC, through the 2018 Order, *exercised* or *lost* statutory authority is key to the conflict preemption analysis. Was the 2018 Order an affirmative exercise of the FCC's statutory authority? Or, was it a threshold decision that then stripped the FCC of the statutory authority to preempt state regulation? Herein lies the crux of the issue.

Plaintiffs and the District Court argue for the former interpretation, that the FCC in the 2018 Order was affirmatively exercising its statutory authority to classify broadband services, and in doing so, "expressly immunizing that service from *ex ante* rate regulation." Appellee Br. 20. In this view, the FCC's election of the Title I regime reflects, and furthers, a genuinely federal broadband policy of an open internet—a federal policy that, according to the Plaintiffs, has preemptive authority.

But Congress's grant of power to the FCC to choose Title I between Title II does not allow the FCC to "mix and match its favorite parts of both" Title I and Title II. *Mozilla*, 940 F.3d at 84. The FCC cannot choose Title I's deregulatory approach at the same time it seeks to

[6] By this question, we do not mean to ask whether regulations and orders promulgated by federal agencies, by principle, have preemptive effect. The Supreme Court has said that regulations by agencies "have no less preemptive effect" than statutes themselves." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuest*a, 458 U.S. 141, 153 (1982).

preempt state price regulation—since the latter can only be done under Title II authority. The 2018 Order may have been an exercise of the FCC's statutory authority *to choose between titles*, but this does not mean that it necessarily was also an exercise of the FCC's statutory authority *to regulate rates (or forbear) and preempt states*.

Furthermore, agency policy preferences alone do not trigger preemption. The *Mozilla* court emphasized that "as a matter of both basic agency law and federalism, the power to preempt the States' laws must be conferred by Congress" and "cannot be a mere byproduct of self-made agency policy." *Id.* at 78. The 2018 Order reflects the FCC's classification choice and even its policy wishes, but the Order's import goes no further. "To put it even more simply, policy statements are just that—statements of policy. They are not delegations of regulatory authority." *Id.* at 79. (cleaned up; citing *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010)). The FCC cannot create its own grants of regulatory authority by issuing orders and policy judgments.

Instead, the FCC made a threshold classification, and this determined the contours of the regulatory regime it would operate within. This regime, Title I, does not give the FCC any express or ancillary statutory authority to promulgate rate regulation. In fact, it forbids the FCC from doing so. And if there is no authority under Title I to regulate rates, then there is no authority to preempt state regulations that do so. *See also ACA Connects v. Bonta*, 24 F.4th at 1241 ("A fundamental principle of preemption, however, is that an absence of federal regulation may preempt state law only if the federal agency has the statutory authority to regulate in the first place.")

To be sure, *Mozilla* involved *express* preemption. The D.C. Circuit did not foreclose the possibility of conflict preemption. It did, however, suggest that on the face of the record, there

was no need to preempt *all* inconsistent state or local laws to give the Order its reclassification effect. *Id.* at 85. Instead, a case-by-case analysis was necessary. The D.C. Circuit, in rebutting the dissent's "straw man" argument that the majority's opinion foreclosed implied preemption, proposed that there could be implied preemptive effect from "the *regulatory choices* the Commission makes that are *within its authority*." *Id.* (emphasis added). This suggests that the 2018 Order can possibly have implied preemptive effect if two conditions are met: (i) the FCC has made a regulatory choice, and (ii) the choice is within its statutory authority (here, Title I). For the reasons above, the 2018 Order does not itself constitute that regulatory choice, and so in the present case, there is no regulatory choice by the FCC to examine.[7]

And *Chevron* does not pull in the other direction. Just because the Court has given *Chevron* deference to the FCC's decision to choose between Title I and Title II does not mean that the Court needs to extend deference for the FCC's belief that its reclassification decision established a federal policy agenda with preemptive force. The District Court cannot "turn that subsidiary judgment [of Title I or II classification] into a license to reorder the entire statutory scheme to enforce an overarching 'nationwide regime' that enforces the policy preference underlying the definitional choice." *Mozilla*, 940 F.3d at 84.

We return to the core holding of *Mozilla*: that "preemption authority depends on the Commission identifying an applicable statutory delegation of regulatory authority." *Id.* at 79. There is no applicable regulatory authority here, so there is no conflict preemption.

III. CONCLUSION

To conclude, we hold that the ABA is not preempted by federal law. For the foregoing reasons, we REVERSE the District Court's order granting permanent injunction.

[7] New York suggests an example of a regulatory choice within statutory authority (Title I authority): the 2018 Order's affirmative obligations, like the transparency rule's disclosure requirements.

Applicant Details

First Name	**Marina**
Last Name	**Jerry**
Citizenship Status	**U. S. Citizen**
Email Address	**jerry.m@northeastern.edu**
Address	**Address** **Street** **1305 Kenyon St NW** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20010** **Country** **United States**
Contact Phone Number	**5184291520**

Applicant Education

Date of BA/BS	**May 2019**
JD/LLB From	**Northeastern University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12205&yr=2013**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Northeastern University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mallory, Carol
c.mallory@northeastern.edu
6173735841
Nicole, Porter
nicole.porter@usdoj.gov
Liliana, Mangiafico
s.mangiafico@northeastern.edu
6173733307

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARINA JERRY

1305 Kenyon St. Unit 1, Washington D.C., 20010 | (518) 429-1520 | jerry.m@northeastern.edu

May 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a second-year law student at Northeastern University School of Law, writing to apply for a 2024-2025 clerkship with your chambers. I would be honored to clerk for a judge dedicated to addressing police brutality and racial biases in policing, as I share your commitment to protecting the rights of individuals involved with the criminal justice system.

As an aspiring civil rights litigator with significant legal research and writing experience, I am confident that I would be an asset to your chambers. I am a thorough and self-motivated researcher and writer, and have honed my legal research and writing skills while drafting memoranda and editing motions as an intern with the U.S. Department of Justice's Civil Rights Division and the ACLU National Prison Project. I have been recognized for my research and writing abilities at Northeastern, where I was selected to be a Legal Research and Writing Teaching Assistant and Northeastern University Law Review's Senior Articles Editor. These roles have equipped me with strong organizational abilities, exceptional editing and citation skills, and a keen eye for detail that will allow me to contribute meaningfully to your chambers.

I have enclosed my resume, writing sample, and transcripts, as well as letters of recommendation from Professor Carol Mallory [c.mallory@northeastern.edu], Professor Liliana Mangiafico [s.mangiafico@northeastern.edu], and U.S. Department of Justice Trial Attorney Nicole Porter [nicole.porter@usdoj.gov]. Thank you so much for your consideration.

Respectfully,
Marina Jerry

MARINA JERRY

1305 Kenyon St. Unit 1, Washington D.C. 20010| (518) 429-1520 | jerry.m@northeastern.edu

EDUCATION

NORTHEASTERN UNIVERSITY SCHOOL OF LAW, Boston, MA
Candidate for Juris Doctor, May 2024

Journal:	Senior Articles Editor, Northeastern University Law Review (2023-2024)
	Associate Editor and Submissions Review Committee Member, Northeastern University Law Review (2022-2023)
Teaching Assistant:	Legal Research and Writing, Carol Mallory (Spring 2023)
1L Social Justice Project:	"The Past is the Present: The Violent Anti-Black Legacy of Policing in Chicago"

SAINT MICHAEL'S COLLEGE, Colchester, VT
Bachelor of Arts, *summa cum laude*, in Political Science and Religious Studies, May 2019

Honors:	Political Science Department Award; Phi Beta Kappa
Activities:	Peer Tutor; Honors Program; Mobilization of Volunteer Efforts; String Orchestra

PROFESSIONAL EXPERIENCE

AMERICAN CIVIL LIBERTIES UNION, National Prison Project, Washington, D.C. May 2023 – Aug. 2023
Full-time Legal Intern
Conducting legal research and drafting memoranda related to prisoners' rights impact litigation. Editing briefs, motions, and other legal documents.

PRISONERS' RIGHTS CLINIC, Northeastern University School of Law, Boston, MA
Research Assistant Jan. 2023 – Apr. 2023, May 2022 – Aug. 2022
Produced research memoranda assessing the harms associated with standardized parole conditions in Massachusetts. Presented research to Harvard University's Community Corrections and Reentry Roundtable.

U.S. DEPARTMENT OF JUSTICE, Civil Rights Division, Washington, D.C. Sept. 2022 – Dec. 2022
Full-time Legal Intern, Special Litigation Section
Conducted legal and factual research and drafted legal memoranda related to the enforcement of federal civil rights statutes in corrections and law enforcement settings. Edited motions and other legal documents.

CITY GATE, Washington, D.C. Sept. 2020 – July 2021
AmeriCorps Member
Developed grant proposals to secure funding for free out-of-school time programs that provide academic support to students in underserved communities. Coordinated City Gate's academic enrichment and food distribution programs.

DON BOSCO CRISTO REY HIGH SCHOOL, Takoma Park, MD Aug. 2019 – July 2020
D.C. Service Corps Member
Mentored students in the school's Corporate Work Study Program, connecting students from low-income households with internship opportunities. Managed program attendance and student evaluations.

VERMONT PUBLIC INTEREST RESEARCH GROUP, Burlington, VT June 2019 – Aug 2019
Canvass Field Manager
Supervised canvassers, recorded petition data, and engaged Vermonters in consumer protection and environmental justice campaigns.

Northeastern University
School of Law
Co-op and Career Development

Northeastern University School of Law Grading and Evaluation System

A global leader in experiential learning for over 50 years, Northeastern University School of Law ("NUSL") integrates academics with practical skills as its core educational philosophy. To fulfill NUSL graduation requirements, law students must earn at least 83 academic credits and complete at least three terms of full-time, law-related work through "co-op," our unique Cooperative Legal Education Program.

Consonant with the word "cooperative," NUSL cultivates an atmosphere of cooperation and mutual respect, exemplified in our course evaluation system. NUSL faculty provide detailed feedback to students through narrative evaluations, designed to prepare law students for the practice of law. The narrative evaluations examine law student written work product, contributions to class discussions, results of examinations, specific strengths and weaknesses, and overall engagement in the course. Faculty also award the student a grade in each course, using the following categories:

- **High Honors**
- **Honors**
- **Pass**
- **Marginal Pass**
- **Fail**

A small number of courses are evaluated using a Credit/No Credit evaluation system, instead of a grade. NUSL does not provide GPAs or class ranks.

NUSL transcripts include the following information:

- The course name, grade received, and number credits earned;
- The faculty's narrative evaluation for the course; and
- All co-ops completed, and the evaluations provided by the co-op employer.

"In progress" notations on a transcript indicate that a student has not yet received an evaluation from faculty for a particular course.

During the Spring 2020 semester, due to the COVID-19 pandemic, all courses were subject to mandatory "Credit" or "Fail" evaluations, except for year-long courses LAW 6160 and 6165.

NORTHEASTERN UNIVERSITY

Northeastern University Registrar

Office of the University Registrar
230-271
360 Huntington Avenue
Boston, MA 02115-5000
email: transcripts@northeastern.edu web: http://www.northeastern.edu/registrar/

Record of: Marina Jerry NUID: 002124589
Issued To: MARINA JERRY
JERRY.M@NORTHEASTERN.EDU
REFNUM:06177592

Primary Program
Juris Doctor
College : School of Law
Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021 Law Semester (08/30/2021 - 12/22/2021)						
LAW	6100	Civil Procedure	5.00	HH	0.000	
LAW	6105	Property	4.00	HH	0.000	
LAW	6106	Torts	4.00	HH	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2022 Law Semester (01/10/2022 - 05/06/2022)						
LAW	6101	Constitutional Law	4.00	HH	0.000	
LAW	6102	Contracts	5.00	H	0.000	
LAW	6103	Criminal Justice	4.00	HH	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Summer 2022 Law Semester (05/09/2022 - 08/23/2022)						
LAW	7300	Administrative Law	3.00	HH	0.000	
LAW	7332	Evidence	4.00	H	0.000	
LAW	7443	Professional Responsibility	3.00	H	0.000	
LAW	7448	Employment Discrimination	3.00	HH	0.000	
LAW	7660	Cradle-to-Prison Pipeline	3.00	HH	0.000	
LAW	7690	Intro Writing for Litigation	1.00	H	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Fall 2022 Law Semester (08/29/2022 - 12/23/2022)						
COOP: U.S. Dept. of Justice, Civil Rights Div., Special Litigation Section Washington, DC						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	7966	Public Interest Co-op Work Exp	0.00	CR	0.000	
Ehrs: 0.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2023 Law Semester (01/09/2023 - 04/29/2023)						
LAW	7350	Negotiation	3.00	HH	0.000	
LAW	7398	Federal Crts & the Fed System	4.00	HH	0.000	
LAW	7647	Trial Practice	2.00	H	0.000	
LAW	7687	First Amend Religion Clauses	3.00	H	0.000	
Ehrs:12.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
IN PROGRESS WORK						
LAW	7530	Education Law	3.00	IN PROGRESS		
LAW	7938	Research Assistant	1.00	IN PROGRESS		
In Progress Credits 4.00						
Summer 2023 Law Semester (05/08/2023 - 08/26/2023)						
COOP: ACLU Foundation, National Prison Project Washington, D.C.						
IN PROGRESS WORK						
LAW	7935	Law Review - Editorial Board	1.00	IN PROGRESS		
LAW	7966	Public Interest Co-op Work Exp	0.00	IN PROGRESS		
In Progress Credits 1.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	63.000	0.000	0.000	0.000
TOTAL TRANSFER	0.000	0.000	0.000	0.000
OVERALL	63.000	0.000	0.000	0.000

********** END OF TRANSCRIPT **********

Rebecca Hunter Assoc VP & University Registrar

This transcript processed and delivered by Parchment

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	13482
Course Title:	LSSC: Research & Writing
Course ID:	LAW 6165
Credits:	2
Term:	Spring 2022 Law Semester
Instructor :	Mallory, Carol R.
Grade:	High Honors

Course Description:

Competent and effective legal research and writing skills are the foundation for students' success in law school and in their legal careers. In LSSC's Legal Analysis, Research and Writing component, students learn about the organization of the American legal system, the sources and construction of laws, and how the application of laws may vary with the specific factual situation. Students learn how to research the law to find applicable legal rules, how to analyze and apply those rules to a factual situation, and how to communicate their legal analysis clearly and concisely to different audiences.

Performance Highlights:

Marina's performance in this class was excellent. Marina has very strong analytical skills; her analysis was always well-supported by the law and she possesses the ability to think creatively about the application of law to fact that will make her an effective advocate. Marina's research skills are impressive as well. She approaches research thoughtfully and creatively, her research is always thorough, and she is able to clearly distill the relevant authority in furtherance of her analysis. Marina also has excellent writing skills; her written work is always well organized, clear and concise, and she pays meticulous attention to detail. Marina's final brief—a memorandum of law in opposition to a motion for summary judgment—was a compelling and well-crafted piece of advocacy that a practicing attorney would be proud of. Finally, Marina demonstrated a natural affinity for oral advocacy; in her final oral argument she delivered a well-conceived and persuasive argument on behalf of his client and did so with poise and confidence. In short, Marina possesses the intellect and skill to be an exceptional attorney.

Date: 5.31.2022 4:14PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	12974
Course Title:	LSSC: Research & Writing
Course ID:	LAW 6165
Credits:	2
Term:	Fall 2021 Law Semester
Instructor :	Mallory, Carol R.
Grade:	High Honors

Course Description:

Competent and effective legal research and writing skills are the foundation for students' success in law school and in their legal careers. In LSSC's Legal Analysis, Research and Writing component, students learn about the organization of the American legal system, the sources and construction of laws, and how the application of laws may vary with the specific factual situation. Students learn how to research the law to find applicable legal rules, how to analyze and apply those rules to a factual situation, and how to communicate their legal analysis clearly and concisely to different audiences.

Performance Highlights:

LSSC: Research & Writing is a year-long course. Please refer to the Spring 2022 semester for the final evaluation.

Date: 6.2.2022 3:14PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	13482
Course Title:	Legal Skills in Social Context
Course ID:	LAW 6160
Credits:	2
Term:	Spring 2022 Law Semester
Instructor :	Mallory, Carol R.
Grade:	High Honors

Course Description:

The LSSC Social Justice component immediately applies students' legal research and writing skills in using law as a tool for social change. LSSC links students' pre-law school thinking with the new legal culture in which they find themselves. In the first semester, they begin by forging their own team lawyering dynamic in discussing assigned readings and in preparing, and presenting, several advocacy exercises and written assignments. In the second semester, students apply and consolidate their new legal research and writing skills in addressing an intensive real-life social justice project for a selected client organization. LSSC student teams develop their legal and cooperative problem-solving skills and knowledge while producing real client work of a quality that far exceeds the ordinary expectations of first-year law students. May be repeated once.

Performance Highlights:

As a part of the LSSC course, a group of law students, called a "Law Office" (LO), work together on a year-long social justice project on behalf of a community-based organization. Marina was a member of LO10, which worked on a project on behalf of a Chicago non-profit whose mission is to support grassroots organizations and movement building around the abolition of the prison-industrial complex (due to the nature of their work, the organization wishes to remain anonymous.) The focus of LO10's project was on the history of the Chicago Police Department (CPD), the historical efforts to reform it, and why those efforts have failed. The LO researched statutes, city ordinances, police oversight mechanisms, budgets, police unions, prominent political actors, and individual activists and movements for reform. The LO's project culminated in the creation of a website to catalogue their extensive research. The LO presented the results of their research to the community in a presentation entitled " The Past is The Present:The violent anti-Black legacy of policing in Chicago and why abolition is the only path forward."

As a whole, LO10 was the most collaborative, collegial, high functioning, and effective LO I have had the pleasure to work with in the seven years I've been teaching this course. As a group the law office held themselves to an extremely high standard; their performance—individually, in sub-groups, and as a group—was exceptional, and it was evident in their stellar final work product.

Marina's performance in this portion of the class was excellent as well. Marina engaged deeply with the complex issues covered in the course; she made valuable contributions to the classroom discussions of these issues and wrote thoughtful and insightful reflective essays on the assigned topics. Marina was also an invaluable member of the LO in terms of the project's overall success; she could be counted on to pitch in when needed and did excellent individual work. In particular, Marina did an extraordinary amount of research for the project; she independently and tenaciously researched all of the state statutes pertaining to the Chicago Police Department, was able to pull out themes and trends in this research, and effectively compiled all of this information on the LO's group website. Finally, Marina was a well-regarded member of the LO who had the ability to work well with all of her classmates; her commitment to the project and her hard work throughout the year greatly contributed to the LO's overall positive team dynamic and success.

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	12974
Course Title:	Legal Skills in Social Context
Course ID:	LAW 6160
Credits:	2
Term:	Fall 2021 Law Semester
Instructor :	Mallory, Carol R.
Grade:	High Honors

Course Description:

The LSSC Social Justice component immediately applies students' legal research and writing skills in using law as a tool for social change. LSSC links students' pre-law school thinking with the new legal culture in which they find themselves. In the first semester, they begin by forging their own team lawyering dynamic in discussing assigned readings and in preparing, and presenting, several advocacy exercises and written assignments. In the second semester, students apply and consolidate their new legal research and writing skills in addressing an intensive real-life social justice project for a selected client organization. LSSC student teams develop their legal and cooperative problem-solving skills and knowledge while producing real client work of a quality that far exceeds the ordinary expectations of first-year law students. May be repeated once.

Performance Highlights:

Legal Skills in Social Context is a year-long course. Please refer to the Spring 2022 semester for the final evaluation.

Date: 6.6.2022 1:49PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	12974
Course Title:	Torts
Course ID:	LAW 6106
Credits:	4
Term:	Fall 2021 Law Semester
Instructor :	Kahn, Jonathan D.
Grade:	High Honors

Course Description:

This course introduces students to theories of liability and the primary doctrines limiting liability, which are studied both doctrinally and in historical and social context. The course includes a brief consideration of civil remedies for intentional harms, but mainly focuses on the problem of accidental injury to persons and property. It also provides an introductory look at alternative systems for controlling risk and allocating the cost of accidents in advanced industrial societies.

Performance Highlights:

Demonstrated an outstanding grasp of key tort principles and the contexts in which they apply.

Did an excellent job of applying understandings of theories of responsibility and alternatives to evaluate and apply legal rules to specific situations.

Your exam evidenced well developed skill for analyzing legal problems and applying rules to new fact patterns as well great skill at identifying and exploring some of the subtler legal issues presented.. You did a good job of drawing upon existing case law to build analogies to analyze the exam fact patterns.

Date: 1.20.2022 6:35PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	12974
Course Title:	Civil Procedure
Course ID:	LAW 6100
Credits:	5
Term:	Fall 2021 Law Semester
Instructor :	Williams, Lucy A.
Grade:	High Honors

Course Description:

Introduces students to the procedural rules that courts in the United States use to handle noncriminal disputes. Designed to provide a working knowledge of the Federal Rules of Civil Procedure and typical state rules, along with an introduction to federalism, statutory analysis, advocacy, and methods of dispute resolution. Examines procedure within its historical context.

Performance Highlights:

- You identified virtually all of the issues.
- Your analysis reflected a solid understanding of the complex materials covered in the course.
- You routinely cited to relevant case law and rules and applied them to the facts of the hypotheticals.
- Your discussion of subject matter jurisdiction, issue preclusion, and summary judgment were particularly strong.
- Your performance on the multiple-choice portion of the exam was very good.
- Your paper was very well written.

Date: 1.20.2022 6:33PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	12974
Course Title:	Property
Course ID:	LAW 6105
Credits:	4
Term:	Fall 2021 Law Semester
Instructor :	Kelley, Melvin J.
Grade:	High Honors

Course Description:

This course covers the major doctrines in American property law, including trespass, servitudes, estates in land and future interests, landlord-tenant relationships, nuisance, and takings. Students are introduced to rules, policies, and current controversies.

Performance Highlights:

Demonstrated robust knowledge of core U.S. Property Law doctrine as well as the underlying public policy elements in addition to an exceptional capacity to mobilize these insights to assess novel fact patterns. Solid ability to convey legal analyses in written communications.

Date: 2.24.2022 1:54PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	13482
Course Title:	Criminal Justice
Course ID:	LAW 6103
Credits:	4
Term:	Spring 2022 Law Semester
Instructor :	Ramirez, Deborah A.
Grade:	High Honors

Course Description:

In this course, students are introduced to the fundamental principles that guide the development, interpretation and analysis of the law of crimes. They are also exposed to the statutory texts—primarily the Model Penal Code, but also state statutes. In addition, students are introduced to the rules and principles used to apportion blame and responsibility in the criminal justice system. Finally, students examine the limits and potential of law as an instrument of social control.

Performance Highlights:

Overall, your performance in this class was outstanding. On the exam, you did an outstanding job of analyzing the Model Penal Code issues presented by the factual scenario in question one. On question two, you did an outstanding job of analyzing the federal search and seizure issues that might be raised by the attorneys for Cougar and Samuel. In particular you did an outstanding job of analyzing the homicide issues in question one. This was one of the best answers in the class. Congratulations!

Date: 5.31.2022 2:32PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	13482
Course Title:	Constitutional Law
Course ID:	LAW 6101
Credits:	4
Term:	Spring 2022 Law Semester
Instructor :	Paul, Jeremy R.
Grade:	High Honors

Course Description:

Studies the techniques of constitutional interpretation and some of the principal themes of constitutional law: federalism, separation of powers, public vs. private spheres, equality theory and rights analysis. The first part of the course is about the powers of government. The second part is an in-depth analysis of the 14th Amendment.

Performance Highlights:

Your produced cogent and sophisticated analyses of tough legal issues.

You demonstrated excellent command on constitutional doctrine.

Your writing is clear, effective and persuasive.

Date: 6.13.2022 10:12AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	13482
Course Title:	Contracts
Course ID:	LAW 6102
Credits:	5
Term:	Spring 2022 Law Semester
Instructor :	Phillips, David M.
Grade:	Honors

Course Description:

This course examines the legal concepts governing consensual and promissory relationships, with emphasis on the historical development and institutional implementation of contract theory, its relationship and continuing adaptation to the needs and practice of commerce, and its serviceability in a variety of non-commercial contexts. Topics covered include contract formation, the doctrine of consideration, remedies for breach of contracts, modification of contract rights resulting from such factors as fraud, mistake and unforeseen circumstances, and the modern adaptation of contract law to consumer problems. This course also introduces students to the analysis of a complex statute: the Uniform Commercial Code.

Performance Highlights:

Your performance on the challenging multiple-choice first part of the examination was very good.

Your answers to the essay problems on the examination evinced quite good identification and analysis of the issues raised.

Your class parrticipation was very good. Thank you.

Date: 6.2.2022 3:43PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Employment Discrimination
Course ID:	LAW 7448
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Davis, Joshua M.
Grade:	High Honors

Course Description:

The Employment Discrimination course focuses on Title VII of the 1964 Civil Rights Act. It surveys the Supreme Court's decisions in this ever-changing area of law—including the recent decisions in Nassar and Vance, which reflect the efforts of the current Court to reduce the number of cases filed in this area.

Performance Highlights:

This summer's Employment Discrimination course included two opportunities for evaluation in addition to in-class participation. The first was a one on one counseling exercise in which the student advised the teacher (as client) in connection with an employment problem at a fictional law firm. The second, and most important, was the final examination. That examination consisted of two questions. The first was a traditional issue-spotting question involving a myriad of possible claims. The second (and shorter) question sought advice about terminations in a conceivably fraught context.

Marina's work this semester was simply excellent. Her contributions to class and performance on the counseling exercise reflected judgment and clarity of thinking. Her examination (which was excellent in all respects) cemented the strong impression made by her other work.

Date: 10.24.2022 3:30PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Administrative Law
Course ID:	LAW 7300
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Rosenbloom, Rachel E.
Grade:	High Honors

Course Description:

This course provides an introduction to the legal doctrines designed to empower and constrain government agencies and officials in their daily practice of governance. Topics include the constitutional status of administrative agencies, due process, the Administrative Procedure Act and the availability and standards of judicial review of agency actions. The course emphasizes the historical evolution of the modern administrative state and the regulatory agency's peculiar role in our system of governance.

Performance Highlights:

- Demonstrated a very strong grasp of the Administrative Procedure Act and relevant Supreme Court jurisprudence
- Drafted an outstanding research memorandum analyzing the relationship between a regulation and its authorizing statute
- Demonstrated excellent writing and analytical skills

Date: 10.6.2022 3:58PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Cradle-to-Prison Pipeline
Course ID:	LAW 7660
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Mangiafico, Santina L.
Grade:	High Honors

Course Description:

This course examines how we construct the cradle/school to prison pipeline while focusing on several pivotal points that channel largely poor Black and Brown students into it. With an eye toward practical application, students will learn about, critique, problem solve and create pipeline disrupting solutions looking to restorative justice as a time-honored justice paradigm alternative to our western constructions.

Performance Highlights:

Your performance in this course was very good. You assertively and confidently participated of class discussion, and were always prepared. Your final paper was well structured, researched, and articulately written. You carefully presented your findings and showed great command of the subject as you tried to answer the question presented.

You will be a great lawyer!

Prof. Mangiafico

Date: 10.7.2022 11:25AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Intro Writing for Litigation
Course ID:	LAW 7690
Credits:	1
Term:	Summer 2022 Law Semester
Instructor :	Leahy, Stefanie E.
Grade:	Honors

Course Description:

Introduces students to litigation documents, including engagement and demand letters; complaints; answers; discovery requests (such as interrogatories, requests for the production of documents, and requests for admission); and motions. Considers audience, purpose, and components in drafting a document, taking into account relevant strategic considerations and general principles that apply to all litigation documents. Examines the protections associated with attorney-client privilege and attorney work product. Offers students an opportunity to review and draft a variety of litigation documents, to find and modify sample documents, and to find and apply the rules of the relevant jurisdiction.

Performance Highlights:

Over the course of two weeks, students in Introduction to Writing for Lit had the opportunity to work collaboratively with other students as well as discuss and draft a variety of litigation documents.

Marina works well either independently with little supervision and was able to produces quality work. Marina successfully produced a case brief related to the operation of the work product doctrine in MA courts, edited a Complaint, submitted "research request" supervisor emails, analyzed documents for privilege, and produced a tightly written Motion in Limine.

Considering the amount of work required in such a short period of time, Marina displayed strong time management skills. In the final reflection, Marina highlighted the takeaways from the course, including the importance of relying on samples when appropriate and modifying them to fit the specific needs of the client. Marina also understands the importance of paying attention to variable factors within litigation, including for example the presiding judge or the cost implications to the client.

Marina is dedicated to improving her research and writing and she demonstrated that she has strong research and writing skills. She is professional and works hard.

Date: 9.13.2022 7:04PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Professional Responsibility
Course ID:	LAW 7443
Credits:	3
Term:	Summer 2022 Law Semester
Instructor :	Long, Alex
Grade:	Honors

Course Description:

This course focuses on the legal, ethical and professional dilemmas encountered by lawyers. Emphasis is on justice as a product of the quality of life that society provides to people rather than merely the process that the legal system provides once a crime or breach of duty has occurred. The course also provides students with a working knowledge of the American Bar Association's Model Rules of Professional Conduct and the Code of Professional Responsibility as well as an understanding of the underlying issues and a perspective within which to evaluate them. In addition, the course examines the distribution of legal services to poor and non-poor clients.

Performance Highlights:

- Acquired a thorough overview of the rules of professional conduct, common law principles, and constitutional rules that regulate the conduct of lawyers.
- Demonstrated understanding of ethics rules through completion of MPRE-type questions.
- Made thoughtful and substantial contributions to class discussions.
- Wrote an excellent research paper on bar admission for individuals with prior criminal convictions.

Date: 9.2.2022 10:21AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	14116
Course Title:	Evidence
Course ID:	LAW 7332
Credits:	4
Term:	Summer 2022 Law Semester
Instructor :	Tumposky, Michael L.
Grade:	Honors

Course Description:

This course examines how courtroom lawyers use the evidence rules to present their cases—notably, rules regarding relevance, hearsay, impeachment, character, and experts. The approach to the study of evidence will be primarily through the "problem" method—that is, applying the provisions of the Federal Rules of Evidence to concrete courtroom situations. Theoretical issues will be explored as a way to deepen the student's appreciation of how the evidence rules can and ought to be used in litigation.

Performance Highlights:

Your performance in the class was very good and at times excellent. You have a thorough understanding of the Rules of Evidence. Well done!

Date: 10.14.2022 8:08PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	25278
Course Title:	Federal Crts & the Fed System
Course ID:	LAW 7398
Credits:	4
Term:	Spring 2023 Law Semester
Instructor :	Burnham, Margaret A.
Grade:	High Honors

Course Description:

The subject of this course is the distribution of power between the states and the federal government, and between the federal courts and other branches of the federal government as manifested in jurisdictional rules of the federal courts. The topics covered include the nature of the federal judicial function, the review of state court decisions by the United States Supreme Court, and the jurisdiction of federal district courts, with special emphasis on actions claiming constitutional protection against state official actions.

Performance Highlights:

You performed exceptionally well in this course. You participated regularly and effectively across the semester, and you performed very well on the exam. You handled all of the questions on the exam with skill and finesse, demonstrating excellent control over a broad area of federal law and fine analytical skills.

Date: 5.30.2023 6:26PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	25278
Course Title:	Negotiation
Course ID:	LAW 7350
Credits:	3
Term:	Spring 2023 Law Semester
Instructor :	Bisson, Barry J.
Grade:	High Honors

Course Description:

Negotiation is a course where students engage in simulated disputes and transactions, which are then debriefed in class. Through frequent in-class mini-negotiations and major simulations, the course focuses on: (1) negotiation planning, (2) case preparation and evaluation, (3) client counseling and informed client consent, (4) analysis of the bargaining range and principled concession patterns, (5) competitive, cooperative and problem-solving strategies, (6) information bargaining, (7) ethics and (8) critiques of negotiation patterns and institutions. Students are required to turn in preparation materials and to keep weekly journals, reviewed by the instructor, addressing their experiences in, and thoughts about, negotiations. Students are encouraged to internalize habits of analysis, prediction, preparation, and flexibility and to become more self-evaluative for their future negotiating experiences.

Performance Highlights:

- Demonstrated superb negotiation skills.
- Made many valuable contributions to class discussions.
- Showed an exceptional understanding of the importance of knowing the facts of a client's case and the strategies that can be used to parse out those facts.
- Showed a remarkable understanding of value-claiming and value-creating and how adversarial and problem-solving approaches impact negotiations.
- Demonstrated a superior ability to diagnose, predict, and strategize various client matters.
- Acquired an exemplary analytical understanding of a client's better alternative to a negotiated agreement (" BATNA").

Date: 5.12.2023 10:29AM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	25278
Course Title:	Education Law
Course ID:	LAW 7530
Credits:	3
Term:	Spring 2023 Law Semester
Instructor :	Lopez, Jane
Grade:	High Honors

Course Description:

Surveys current issues in U.S. education law. Topics may include high-stakes testing, school choice and the charter school movement, resegregation, special education, the school-to-prison pipeline, and school funding.

Performance Highlights:

- You did exceptionally well on the final exam. You distilled the relevant laws keenly and demonstrated a deep understanding of the statutory and constitutional issues and their application to the facts.
- Your legal arguments were well constructed and clearly articulated.
- Your in-class presentation demonstrated a deep understanding of the social context in which education law operates.

Date: 5.30.2023 9:28PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	25278
Course Title:	First Amend Religion Clauses
Course ID:	LAW 7687
Credits:	3
Term:	Spring 2023 Law Semester
Instructor :	Haupt, Claudia
Grade:	Honors

Course Description:

Examines the religion clauses of the First Amendment and related statutory regimes, emphasizing the U.S. Supreme Court's free exercise and establishment clause jurisprudence. Evaluates individual and institutional claims of religious liberty. Explores the implications of government funding of religious institutions and activities. Discusses government expression or endorsement of religious messages.

Performance Highlights:

Acquired knowledge of the key concepts of the law of religious free exercise and establishment clause limits on state religious expression.

Developed a set of analytical tools to use in constitutional problem solving and understand how courts and litigators approach questions of religious free exercise and nonestablishment.

Developed an appreciation for the social, political, economic, and historical values reflected in the development of this area of law.

Made thoughtful contributions to class discussions.

Demonstrated very strong research, writing, and analytical skills in seminar paper on a timely and important religion clause topic.

Date: 5.4.2023 3:30PM

Northeastern University School of Law

416 Huntington Avenue
Boston, Massachusetts 02115

Student:	Marina Jerry
Exam #:	25278
Course Title:	Trial Practice
Course ID:	LAW 7647
Credits:	2
Term:	Spring 2023 Law Semester
Instructor :	Fahey, Elizabeth M.
Grade:	Honors

Course Description:

An introduction to the tactical and strategic problems commonly encountered in the trial of civil and criminal cases is the main objective of this course. Attention is given to the forensic aspects of trial practice, techniques of direct and cross-examination, and opening and closing summations. Prior course work in Evidence is a prerequisite.

Performance Highlights:

You were a very good student and contributor to this class.. You were well prepared for class. You are very poised, natural, articulate and appear comfortable as a trial advocate. You incorporated the lessons taught into your capable performances as a trial advocate. You were an enthusiastic and accomplished student in this course. You did a very nice job in your opening statement and direct and cross exams, all in the mock trial. You did very good work in this course.

You have done a very fine job on all four of this course's learning objectives, ie. developing an overall trial strategy, marshaling all available evidence for your client, demonstrating trial lawyering skills, and gaining confidence in your trial skills (all important aspects of Learning Outcome # 4, approved by the NEU faculty in 2016: Demonstrate Awareness of and Recognize the Roles and Ethical, Professional and Business Norms of Law: What Lawyers Do). You should be very proud of your accomplishments in this class.

You surely have the capacity to be a very effective trial lawyer, if that is a personal goal. I wish you much satisfaction and success in your legal career.

Date: 4.25.2023 1:00PM

Fall 2022 : Marina Jerry - Fall 2022 Apply Direct Alternate Contact for Eval (96942) (U.S. Dept. of Justice, Civil Rights Div., Special Litigation Section (Washington, DC))

EMPLOYER FINAL EVALUATION

Approve	Yes
Requested On	Dec 12, 2022 8:58 am
Student	Marina Jerry
Date Employed From:	September 6, 2022
Date Employed To:	December 16, 2022
Address	150 M. Street, NE., Washington, DC 20001
Employer Name	U.S. Dept. of Justice, Civil Rights Div., Special Litigation Section (Washington, DC)
1) Areas of law engaged in, and level of proficiency	Marina was engaged in Civil Rights Law matters that covered abortion rights, corrections, juveniles, and police cases that looked at many different domestic civil rights laws, including CRIPA and constitutional law. From our perspective she was highly proficient in grasping the law.
2) Skills demonstrated during the co-op	First, she researched and wrote memos helping attorneys answer legal questions. Second, she developed what we call an "S-10" which is the start of an investigation of a jurisdiction that Special Lit may turn into a public investigation. An "S-10" requires developing facts and applying the law to those facts in an investigative report - one of the hardest things we ask interns to do. Third, she did fact research for us on a variety of topics from abortion to police to corrections. She also presented her work to attorneys in meetings.
3) Professionalism, work ethic, and responsiveness to feedback	Marina was incredibly professional, worked extremely hard, was ahead of schedule with assignments, and wonderfully positive in all her interactions with folks in Special Lit. I great representative for Northeastern!
4) Ability to work with colleagues and clients; ability to integrate	Marina's peer interns said they loved working with her as did the other attorneys and paralegals. She was also able to bring her insights from past jobs and experiences to her work, which is great to have!

knowledge from other disciplines	
5) Further details about the student's performance	Marina is going to go far. She got high marks from every one of our attorney's here. Her works was thorough and often ahead of schedule, and everyone remarked at how positive she is which injects a dose of freshness to the teams here at SPL. We'll miss her!
Submitted by:	Kyle Smiddie
Date submitted:	December 12, 2022

SAINT MICHAEL'S COLLEGE FOUNDED 1904

Student Name: Ms. Marina Jerry
SSN: XXX-XX-2691
DOB: 05/28
Student ID #: 5803187

Ms. Marina Jerry
MARINA JERRY
MARINAJERRY1@GMAIL.COM
,

Transfer Credit:
SUNY At Albany 7.00
Advanced Placement Program 20.00

Term GPA 0.000 Credit 27.00
Cum GPA 0.000 Credit 27.00

Fall Semester 2016

PO 245	Intro International Relations	4.00	A
FS 124	Human Rights in China	4.00	A
RS 140	Catholic Christianity	4.00	A
SP 102	Second Semester Spanish	4.00	A

Term GPA 4.000 Credit 16.00
Cum GPA 4.000 Credit 43.00

Spring Semester 2017

ID 100	Organizing for Social Change	0.00	AU
EN 110	Lit Studies: Spoken Word(HON)	4.00	A
PH 103	Pursuing Wisdom	4.00	A
PO 200	Research Methods	4.00	A
PO 285	Intro to Comparative Politics	4.00	A-
MU 372	String Orchestra	2.00	A

Term GPA 3.933 Credit 18.00
Cum GPA 3.965 Credit 61.00

Fall Semester 2017

PJ 101	Approaches to Peace	4.00	A
PO 261	European Political Thought	4.00	A-
PO 351	Politics Global AIDS Pandemic	4.00	A
RS 224	Understandings of God (HON)	4.00	A
MU 372	String Orchestra	2.00	A

Term GPA 3.933 Credit 18.00
Cum GPA 3.954 Credit 79.00

Spring Semester 2018

RS 222	Sacrament, Worship and Ritual	4.00	A
RS 236	Christian Social Ethics	4.00	A
RS 332	The Problem of Evil	4.00	A
MU 372	String Orchestra	2.00	A
PO 340	Social Movmts&Contentious Pol	4.00	A

Term GPA 4.000 Credit 18.00
Cum GPA 3.966 Credit 97.00

Fall Semester 2018

PO 332	American Constitutional Law	4.00	A-
PO 410	Sr Seminar: Global Governance	4.00	A
RS 239	Religion, Ecology and Ethics	4.00	A
RS 310	Religion: Theory & Method	4.00	A

Term GPA 3.925 Credit 16.00
Cum GPA 3.958 Credit 113.00

Spring Semester 2019

PO 330	Capital Punish.:America (HON)	4.00	A
RS 325	Buddhism	4.00	A
RS 350	Topics: Christian Mysticism	4.00	A
RS 410	Religious Studies Sem (HON)	4.00	A
HO 301	Honors Colloquium	2.00	A

Term GPA 4.000 Credit 18.00
Cum GPA 3.965 Credit 131.00

Completed Saint Michael's College Honors Program
****
Degree Received: Bachelor of Arts -- May 2019
Majors.....: Political Science
Religious Studies
Honors.....: Summa Cum Laude
****

End of official record.

This transcript processed and delivered by Parchment

Marnie Owen, M.Ed.
Registrar & Assistant Dean for Academic Affairs

Office of the Registrar
One Winooski Park, Colchester, Vermont 05439
802.654.2571 (f) 802.654.2690 registrar@smcvt.edu

Transcripts are official when the signature of the Registrar appears undistorted.

Accreditation
Saint Michael's College is accredited by the New England Commission of Higher Education.

Release of Information
In compliance with the Family Educational Rights and Privacy Act of 1974, a student's transcript information is released on the condition that the recipient "will not permit any other party to have access to such information without the written consent of the student."

Credit Definition
Saint Michael's College credits are in semester hours.

Transfer Credit
Saint Michael's accepts credits from regionally accredited and select nationally accredited colleges and universities for courses graded C- or higher that is comparable to SMC coursework. Grades do not transfer and only the accepted credits are shown on the transcript.

GRADING SYSTEM

1904 – 1947:
Prior to February 1, 1947 all grades were expressed in percentages with 60% grade required to pass.

1947 – 1967:
From February, 1947 to June, 1967 the following grades and achievement levels were in effect:

GRADE	ACHIEVEMENT LEVEL	RANGES
A	Superior	Above 90%
B	Above Average	80% - 89%
C	Average	70% - 79%
D	Poor	60% - 69%
F	Failure	Below 60%

EFFECTIVE SEPTEMBER 1967:

GRADE	ACHIEVEMENT LEVEL	GRADE POINTS
A	Superior	4 per cr hr
B	Above Average	3 per cr hr
C	Average	2 per cr hr
D	Poor	1 per cr hr
F	Failure	0 per cr hr

EFFECTIVE SEPTEMBER 1979:

GRADE	POINTS	GRADE	POINTS
A	4 per cr hr	C	2 per cr hr
B+	3.5 per cr hr	D+	1.5 per cr hr
B	3 per cr hr	D	1 per cr hr
C+	2.5 per cr hr	F	0 per cr hr

EFFECTIVE SEPTEMBER 1990: *Undergraduate*

GRADE	POINTS	GRADE	POINTS
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D+	1.3
B	3.0	D	1.0
B-	2.7	F	0.0
C+	2.3		

EFFECTIVE MAY 1983: *Graduate*

GRADE	POINTS	GRADE	POINTS
A	4.0 per cr hr	B-	2.7 per cr hr
A-	3.7 per cr hr	C	2.0 per cr hr
B+	3.3 per cr hr	F	0.0 per cr hr
B	3.0 per cr hr	WF	0.0 per cr hr

Other grades excluded from the grade point average:

AU	Audit
I	Incomplete
P	Pass
TR	Transfer Credit
WD	Withdrew from the course
WP	Withdrew Passing
X	Missed final exam
NR	Grade Not Received from Instructor
XT	Extended for Thesis Work
NP	No Pass (Spring 2020 only)

SPRING 2020
Grading policies adjusted due to COVID-19.

GRADE POINT AVERAGE
The cumulative grade point average is calculated by dividing the total quality points earned by the total number of graded credits attempted.

This Academic Transcript from Saint Michael's College located in Colchester, VT is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc is acting on behalf of Saint Michael's College in facilitating the delivery of academic transcripts from Saint Michael's College to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than Saint Michael's College's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, Saint Michael's College, One Winooski Park, Colchester, VT, 05439, Tel: (802) 654-2571.

May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically recommend Marina Jerry for a clerkship in your chambers. Ms. Jerry was a student in my Legal Skills in Social Context (LSSC) course during her first year in law school. I was so impressed with her performance in that class that I hired her as a Teaching Assistant for the class in her second year. Based on both experiences with Ms. Jerry I can say without reservation that she possesses the intellect, skill, work ethic, and professionalism to be an exceptional law clerk.

Ms. Jerry's performance in LSSC in her first year demonstrated that she has excellent research skills as well as a natural affinity for legal analysis. Ms. Jerry's research for her assignments was always thorough and she was able to identify the relevance of cases that most first year law students would have missed. Similarly, her analysis of how the caselaw could be applied to a set of facts was nuanced; she was always able to see the full range of possible analyses of the issues presented in her assignments. Ms. Jerry's communication skills are similarly impressive. Ms. Jerry came to law school with well-developed, strong writing skills and was able to quickly adapt to the somewhat unique nature of legal writing. Her written work is always clear, concise, well organized, and well supported by legal authority.

The extent of her analytical and writing skills was especially evident when she worked with me as a Teaching Assistant. The students who she assisted made a point of telling me how helpful she was in guiding them to an understanding of the legal issues involved in their assignments as well as identifying areas for growth in their writing. The ability to teach a particular skill to others is a strong indicator of the strength of one's own skills; Ms. Jerry was one of my most successful TAs in this regard.

Ms. Jerry's exceptional intellect and legal skills are also evident from her academic record. As Northeastern does not evaluate student performance with traditional grades, students do not have GPAs or class rank. But, Ms. Jerry's record of obtaining High Honors—the equivalent of an A+— in most of her classes is an incredible achievement that puts her at the very top of her class academically.

Finally, Ms. Jerry is a pleasure to work with, possesses the ability to work independently, and is a consummate professional. In the project portion of the LSSC course during Ms. Jerry's first year, she took on significant responsibility for the team's project, could be counted on to step in when required, and was unwaveringly kind and supportive of her classmates. In short, she was a valued team player. Similarly, while working for me as a TA, I could count on Ms. Jerry to do her work, and do it well, and her positive attitude was infectious. It is not surprising to me at all that her coop employer noted her strong work ethic and positivity in their evaluation of her.

In short, Ms. Jerry is an intelligent, skilled, and lovely human being who would make an outstanding law clerk. I consider myself lucky to have had the opportunity to work with her and recommend her without hesitation. If you should have any questions, please feel free to contact me.

Sincerely,

Carol R. Mallory
Teaching Professor
c.mallory@northeastern.edu
617-373-5841

U.S. Department of Justice
Civil Rights Division

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

The Honorable Jamar Walker, District Judge
U.S. District Court, Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I write this letter of recommendation in support of Marina Jerry, who is applying for a position with your chambers. Ms. Jerry worked as an intern with the Special Litigation, Civil Rights Division of the Department Justice in the fall of 2022, and quickly established herself as an exemplary intern with great legal research and writing skills.

The Special Litigation Section has the authority, pursuant to the Crime Control and Law Enforcement Act, 34 U.S.C. § 12601, to investigate allegations that law enforcement agencies are engaging in a pattern or practice of conduct that violates the Constitution or laws of the United States. The Section also has the authority under Section 12601 to investigate allegations that governmental agencies with the responsibility for the administration of juvenile justice or the incarceration of juveniles are engaging in a pattern or practice of unconstitutional conduct. If the Section finds reasonable cause to believe that such a pattern or practice exists, we have the authority under Section 12601 to sue for equitable and declaratory relief to remedy the pattern or practice. Our work focuses on unconstitutional conduct by police departments, prosecutor offices, and juvenile judges, and includes addressing patterns or practices of unlawful discrimination.

As a trial attorney with the Special Litigation Section, I had the opportunity to work closely with Ms. Jerry, who was assigned as an intern to one of my police accountability cases. I reviewed and supervised many of her assignments for the case. I found Ms. Jerry's work product to be thoughtful, well-researched, concise, and very well written. She had a keen grasp of the underlying issues involved in each assignment, and her legal research and memoranda demonstrated her ability to think critically about complex legal matters. Ms. Jerry also completed assignments very quickly, turning them around days, and sometimes weeks, before the assignment was due.

Ms. Jerry is kind, smart, and very efficient. She is an excellent writer, and I have no doubt that she would be an asset to you if hired. Please feel free to contact me at (202) 532-5131 if you have any questions.

Sincerely,

Nicole Porter

Nicole Porter
Trial Attorney

Northeastern University
School *of* Law

United States District Court
Via: OSCAR system

May 25, 2023

Re: RECOMMENDATION LETTER FOR MARINA JERRY

Dear Judge:

It is my great pleasure to write to you to recommend my former student, Marina Jerry for a clerkship in your office. I am a Professor at Northeastern University School of Law and Boston University School of Law. I am admitted to the Bars of Massachusetts, New York, Pennsylvania and Venezuela.

I have known Marina since August of 2022. She was my student in the Cradle to Prison Pipeline course that I have taught at Northeastern since 2019. The course combines a traditional legal research and writing curriculum with a social justice component in which students examine in depth the root causes of mass incarceration in the United States and research possible solutions.

Marina is an excellent communicator. She has an ability to identify areas of weakness in a case and has vert good legal reasoning, writing and speaking skills, she is very articulate both in writing and in oral presentations. Marina is also extremely kind and able to get along with just about anyone. She is polite, caring and very thoughtful and also very good at recognizing when she needs assistance and is comfortable seeking help when needed. Marina has also demonstrated ability working with multidisciplinary subjects.

Marina is a very confident individual and welcomes guidance and supervision, responds very well to feedback and will follow direction with no problem at all.

I believe Marina has everything needed to succeed as an attorney and would be a great addition to your ckerkship program. She has always upheld high ethical standards and the courts will absolutely benefit from her participation and future admission to the Bar, reason why I strongly support her application and recommend her for the position.

Sincerely,

Santina Liliana Mangiafico
MA BBO 652874

Northeastern University
School *of* Law

MARINA JERRY

103 Seelye Drive, Burnt Hills, NY 12027| (518) 429-1520 | jerry.m@northeastern.edu

WRITING SAMPLE

This writing sample is an edited excerpt from a brief written for a legal research and writing class. The brief is a plaintiff's response to a defendant's motion for summary judgment on two claims under Title VII of the Civil Rights Act of 1964 — an employment discrimination claim and a hostile work environment claim. Michael Kowalski, the plaintiff, is a custodian employed by Spotless, Inc. Spotless, Inc., the defendant, is a corporation that provides janitorial services to schools.

I independently conducted the research necessary for this brief. Although my professor provided me with general feedback on my first draft of this brief, the writing contained in this final product is entirely my own.

ARGUMENT

Defendant's Motion for Summary Judgment should not be granted because there are genuine issues of material fact on both the Title VII employment discrimination claim and the Title VII hostile work environment claim.

Summary judgment is only appropriate when there are no genuine issues of material fact. *Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 791 (7th Cir. 2014). In determining whether a genuine issue of material fact exists, the court should view all evidence in favor of the nonmoving party. *Id.*

Kowalski alleges disparate treatment under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2. Kowalski has brought both a Title VII employment discrimination claim and a Title VII hostile work environment claim. Defendant suggests that summary judgment is appropriate on the employment discrimination claim because, as a matter of law, Kowalski did not suffer an adverse employment action. Defendant also indicates that summary judgment is appropriate on the hostile work environment claim because (1) Kowalski did not face harassment so severe or pervasive that it altered the conditions of his employment, and (2) Defendant should not be held liable for the harassment. However, issues of material fact exist as to whether Kowalski suffered an adverse employment action, whether the harassment he experienced was sufficiently severe or pervasive to alter the conditions of his employment, and whether Defendant should be held liable for the harassment. These issues must go to the jury; therefore, Defendant's Motion for Summary Judgment should be denied.

I. SUMMARY JUDGMENT ON THE EMPLOYMENT DISCRIMINATION CLAIM IS NOT APPROPRIATE BECAUSE THERE IS AN ISSUE OF MATERIAL FACT AS TO WHETHER KOWALSKI SUFFERED A COGNIZABLE ADVERSE EMPLOYMENT ACTION.

An adverse employment action exists when a defendant takes an action that materially alters the terms and conditions of the plaintiff's employment. *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002). This change to the terms and conditions of plaintiff's employment must be more than simply an inconvenience or an alteration of the plaintiff's job responsibilities. *Id.*at 742. The court has articulated several general categories of materially adverse employment actions actionable under Title VII, including (1) cases in which the employee's compensation or other financial terms of employment are reduced and (2) cases in which the employee is not moved to a different job and the skill requirements of her present job are not altered, but where the employment conditions are changed to expose her to a humiliating, degrading, unsafe, unhealthful, or otherwise negative workplace environment. *Id*. at 744. To determine whether an employment action is so significant as to materially alter the terms or conditions of employment, the court may consider other indices unique to the situation. *Crady v. Liberty Nat. Bank and Tr. Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993).

Denial of a wage raise has been considered a material alteration of the terms and conditions of employment when the raise is expected by the employee and the employee has performed satisfactorily. *Hunt v. City of Markham*, 219 F.3d 649, 654 (7th Cir. 2000). In such a situation, the denial of a wage request may be considered a reduction in wages, as a raise is necessary to offset the impact of inflation. *Id*. In *Hunt v. City of Markham*, a plaintiff brought an employment discrimination claim, alleging that she was denied an expected wage raise despite the fact that she performed satisfactorily. *Id.* at 651. The *Hunt* court refused to dismiss the

plaintiff's employment discrimination claim, finding that the denial of a raise request under the circumstances could be considered an actionable adverse employment action. *Id*. at 654.

A change to an employee's job responsibilities may also be considered by the court to be a material alteration of the terms and conditions of employment when the change is so significant that it effectively results in a demotion. *Tart v. Ill. Power Co.*, 366 F.3d 461, 473 (7th Cir. 2004). In *Tart v. Illinois Power Co.*, the court found that an adverse employment action existed when service technicians were reassigned duties. *Id.* Despite the fact that the plaintiffs retained their titles, salaries, and benefits, the court found that the plaintiffs were effectively demoted because their reassigned roles involved significantly harsher working conditions than their prior positions. *Id.* Before the reassignment, the service technicians engaged in skilled labor. *Id.* After the reassignment, the service technicians were forced to engage in difficult and degrading manual labor. *Id.* The court applied an objective test to analyze the change to job responsibilities, finding that a cognizable adverse employment action exists when a reasonable worker would not voluntarily choose to undergo such a reassignment. *Id.* Ultimately, the court found that the plaintiffs experienced a cognizable adverse employment action because they were reassigned to an objectively inferior position, as no reasonable worker would prefer the reassigned duties. *Id.* at 474.

A jury could reasonably find that the denial of Kowalski's wage request was a material alteration of the terms or conditions of his employment because the denial effectively diminished Kowalski's compensation over time. There is significant evidence in the record that indicates that Kowalski performed satisfactorily. Kowalski's performance evaluations by his prior supervisor indicate that Kowalski's job performance was stellar. Under this supervisor, Kowalski was evaluated on a ten-point scale in both 2018 and 2019, and received a "nine" or "ten" on each

evaluation. While Kowalski did receive unsatisfactory performance evaluations under his current supervisor in 2020 and 2021, these evaluations are likely a manifestation of the harassment that Kowalski has experienced at the hands of this supervisor, as described at length in Kowalski's hostile work environment claim. There is also significant evidence in the record that demonstrates that Kowalski reasonably expected a raise. When deposed, Kowalski's current supervisor stated that he had given raises to most of Kowalski's coworkers in the past two years. Kowalski also indicated that he received a raise during his first year of employment with Defendant. These assertions indicate that regular raises are typical for custodians, and that Kowalski reasonably expected such raises. Like the *Hunt* plaintiff, who performed satisfactorily and reasonably expected a wage raise but was denied one for over two years, Kowalski has put forth evidence to demonstrate that he performed satisfactorily and reasonably expected a raise, but was repeatedly denied one over the course of two years. The *Hunt* court found that summary judgment on the plaintiff's claim was not appropriate because the denial of a wage request could be considered an adverse employment action by a jury; similarly, this Court should allow the jury to determine whether the denial of Kowalski's wage request constituted an adverse employment action.

A jury could also reasonably find that Kowalski suffered a cognizable adverse employment action when he was reassigned to clean the Commons area of campus. The unique indices of Kowalski's employment indicate that he suffered a change to the terms and conditions of his employment, rather than simply an alteration of employment duties, when his supervisor reassigned him to the Commons. Like the *Tart* plaintiffs, Kowalski retained his salary and title after the reassignment, but his job duties were changed to involve harsher, inferior, and degrading working conditions. Kowalski's reassignment required him to regularly engage in the

degrading task of cleaning the vomit and urine of intoxicated students, a task which would never be required of him in his previous Admissions Office assignment. Kowalski has alleged that his reassignment was objectively unfavorable; applying the standard set forth in *Tart*, it is quite clear that no reasonable person would prefer the Commons reassignment. Therefore, like the *Tart* court, this Court should allow the jury to determine whether Kowalski's reassignment to the Commons constitutes an adverse employment action.

Because there is evidence in the record to suggest that the denial of Kowalski's wage request and his transfer to the Commons could both constitute material alterations of the terms or conditions of Kowalski's employment, the question of whether Kowalski suffered an adverse employment action should go to the jury.

II. SUMMARY JUDGMENT ON THE HOSTILE WORK ENVIRONMENT CLAIM IS NOT APPROPRIATE BECAUSE THERE ARE ISSUES OF MATERIAL FACT AS TO (1) WHETHER THE HARASSMENT KOWALSKI EXPERIENCED WAS SEVERE OR PERVASIVE AND (2) WHETHER DEFENDANT SHOULD BE HELD LIABLE FOR THE HARASSMENT.

An employer will be held liable for a hostile work environment under Title VII when an employee demonstrates that (1) their work environment was objectively and subjectively offensive, (2) they experienced harassment based on a protected characteristic, (3) the harassment was severe or pervasive, and (4) there is a basis for employer liability. *Vance v. Ball State Univ.*, 646 F.3d 461, 461 (7th Cir. 2011). Defendant has moved for summary judgment on the hostile work environment claim, suggesting that Kowalski did not experience severe or pervasive harassment as a matter of law, and that even if Kowalski did experience such harassment, Defendant should not be held liable for the harassment. However, summary judgment is not appropriate because there are issues of material fact as to (1) whether the

harassment Kowalski experienced was severe or pervasive, and (2) whether Defendant should be held liable for the harassment.

1. A jury could reasonably find that the harassment Kowalski experienced was severe or pervasive.

To be cognizable under Title VII, harassment must be severe or pervasive. Severe or pervasive harassment must be both subjectively and objectively offensive. *Johnson v. Advocate Health and Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018). Harassment is subjectively offensive if the plaintiff does not welcome the conduct. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 476-77 (7th Cir. 2004). Harassment is objectively offensive if it alters the terms or conditions of the plaintiff's employment. *Cerros v. Steel Tech., Inc.*, 288 F.3d 1046, 1046 (7th Cir. 2002). To determine whether harassment is objectively offensive, a court will examine the totality of the circumstances. *Id.* These circumstances may include the frequency of the harassing conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating, and whether the conduct significantly interferes with an employee's work performance. *Johnson*, 892 F.3d at 900. Teasing, offhand comments, and isolated incidents do not constitute severe or pervasive harassment. *Hrobowski*, 358 F.3d at 476. However, offensive conduct that is physical in nature, openly racist, or that unreasonably interferes with the plaintiff's work performance may be found to be severe or pervasive. *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 982 (7th Cir. 2014).

Harassment by coworkers may be found to be severe or pervasive if the harassment involves the use of slurs and offensive physical conduct. *Alamo v. Bliss*, 864 F.3d 541, 550 (7th Cir. 2017). In *Alamo v. Bliss*, the court found that harassment could be considered severe or pervasive when it involved (1) two racial slurs targeting the plaintiff, (2) repeated instances of

the plaintiff's food being thrown out or eaten by his coworkers, and (3) two physical altercations, one involving a "chest bump" and one involving the plaintiff being pushed against a wall. *Id. But see Nichols v. Mich. City Plant Plan. Dep't.,* 755 F.3d 594, 601 (7th Cir. 2014) (finding that a single utterance of the word "n****r" as well as several instances of offensive physical conduct by plaintiff's coworker did not constitute severe or pervasive harassment because "one utterance…has not generally been held to be severe enough to rise to the level of establishing liability.").

The court considers harassment to be particularly severe when it involves a supervisor's use of slurs to harass an employee. *Rodgers v. W.-S. Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir. 1993). A supervisor's use of slurs to harass an employee may constitute severe or pervasive harassment even if the supervisor has not engaged in any offensive physical conduct. *Id.* In *Rodgers v. Western-Southern Life Insurance Co.,* the court found that the use of racially derogatory terms by a supervisor on several occasions throughout the course of plaintiff's employment created a hostile work environment actionable under Title VII, suggesting that "no single act can more quickly 'alter the conditions of the working environment'" than the use of a racial epithet by a supervisor towards an employee. *Id.* The *Rodgers* court found that the supervisor's verbal harassment of a subordinate—consisting of two utterances of the word "'n****r,'" a statement that "'you black guys are too fucking dumb to be insurance agents,'" and another statement that "'you must think you're back in Arkansas chasing jack rabbits'"—was sufficient to constitute severe or pervasive harassment. *Id.* at 675-76.

A jury could reasonably find that Kowalski experienced severe or pervasive harassment because the harassment he experienced could be considered subjectively and objectively offensive. Kowalski's deposition indicates that the harassment was clearly subjectively

offensive. Kowalski submitted complaints about the harassment to management at least once a week for several months, and his deposition testimony clearly demonstrates that he did not welcome the conduct—according to Kowalski, the harassment was "beyond [a] joke." Kowalski Dep. 8.

A jury could reasonably find that the harassment perpetrated by Johnson, Kowalski's supervisor, was objectively severe or pervasive. Like the supervisor in *Rodgers*, who used two slurs and two other statements motivated by animus to harass a subordinate, Johnson frequently used the slur "Polack" to refer to Kowalski and repeatedly told Kowalski that he should "go back to Poland." Kowalski Dep 8. The *Rodgers* court found that four instances of verbal harassment by a supervisor was sufficient to constitute severe or pervasive harassment; therefore, a jury could reasonably find that the harassment Kowalski experienced at the hands of his supervisor constituted severe or pervasive harassment.

A jury could also reasonably find that the harassment perpetrated by Kowalski's coworkers was objectively severe or pervasive. Like the harassment in *Alamo*, which the court found to be severe or pervasive, the harassment perpetrated by Kowalski's coworkers involved slurs and offensive physical conduct. Kowalski was subjected to a daily stream of slurs, including the incessant use of the term "Polack." Kowalski's coworkers also used a variety of other derogatory terms to belittle his national origin, repeatedly referring to him as "Pole-alski" and a "commie bastard." The frequency and numerosity of these slurs and deragotary comments indicates that the verbal harassment Kowalski faced was even more pervasive than the two slurs directed at the *Alamo* plaintiff. Moreover, like the harassment in *Alamo*, the harassment Kowalski experienced involved multiple instances of offensive physical conduct perpetrated by coworkers. Kowalski's coworkers intentionally locked him outside of the Commons in the cold,

frequently threw cleaning supplies at him, and strategically put polish on the floor so that he would slip. This physical harassment is certainly more pervasive than the two isolated incidents of physical harassment in *Alamo,* and likely more severe as well; unlike the harassment in *Alamo*, the harassment that Kowalski experienced resulted in physical injury and impacted his work performance. When Kowalski's coworkers put polish on the floor, Kowalski fell and injured his hip. Kowalski was instructed by his doctor to avoid lifting heavy things, limiting his ability to adequately complete his custodial responsibilities. The harassment that Kowalski experienced was at least as severe and pervasive as the harassment experienced by the *Alamo* plaintiff; therefore, like in *Alamo*, this Court should allow the jury to determine whether the harassment perpetrated by Kowalski's coworkers constitutes an adverse employment action.

Because there is evidence in the record to suggest that the harassment perpetrated by Kowalski's supervisor and coworkers was both subjectively and objectively offensive, the question of whether Kowalski experienced severe or pervasive harassment should go to the jury.

Applicant Details

First Name	**Michael**
Middle Initial	**H**
Last Name	**Jeung**
Citizenship Status	**U. S. Citizen**
Email Address	**mjeung@uchicago.edu**
Address	**Address** Street **438 Elder Drive** City **Claremont** State/Territory **California** Zip **91711** Country **United States**
Contact Phone Number	**909-776-5511**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court Board Member**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Casey, Anthony
ajcasey@uchicago.edu
773-702-9578

Siegler, Alison
alisonsiegler@uchicago.edu
773-702-9494

Kovvali, Aneil
akovvali@iu.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.